

(24,344)

20792
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 600.

THE CITY OF CINCINNATI, APPELLANT,

vs.

THE CINCINNATI AND HAMILTON TRACTION COMPANY
AND THE OHIO TRACTION COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO.

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1 In the District Court of the United States, Southern District of Ohio, Western Division.

TRANSCRIPT OF RECORD.

No. 35. In Equity.

THE CINCINNATI & HAMILTON TRACTION COMPANY, a Corporation,
and THE OHIO TRACTION COMPANY, a Corporation, Plaintiffs,

vs.

THE CITY OF CINCINNATI, a Municipal Corporation, Defendant.

Bill of Complaint.

(Filed April 27, 1914.)

To the Honorable the Judges of the United States District Court for the Southern District of Ohio, Western Division:

Plaintiffs state that they are each corporations organized and existing under the laws of the State of Ohio and are citizens of said State of Ohio and residents of the Southern District and Western Division thereof; that the defendant The City of Cincinnati

2 is a municipal corporation under the laws of the State of Ohio and is a citizen of the State of Ohio and is a resident and inhabitant of the Southern District and Western Division thereof.

This is an action arising under the Constitution of the United States and the amount in controversy exceeds three thousand dollars, exclusive of interest and costs.

1. The plaintiff The Cincinnati & Hamilton Traction Company is the owner of a line of electric street railway extending from the intersection of Vine Street and Erkenbrecher Avenue in the City of Cincinnati over and along Erkenbrecher Avenue to Carthage Avenue; thence over and along said Carthage Avenue, also known as Carthage Turnpike, and Carthage Turnpike, through the city of St. Bernard and the village of Elmwood Place and through that part of the City of Cincinnati formerly the village of Carthage to Lockland Avenue; thence north on Lockland Avenue and Anthony Wayne Avenue to the northern boundary of the City of Cincinnati, through the district formerly the villages of Carthage and Hartwell; thence to and into the village of Lockland, Hamilton County, Ohio; and also from the intersection of Anthony Wayne and Woodbine, formerly called Rural, Avenues westwardly over Woodbine Avenue and over De Camp Avenue to Carthage Turnpike, formerly called the Hamilton, Springfield & Carthage Turnpike; thence north on said Carthage Turnpike to the northern boundary of the City of Cincinnati in the district formerly the village of Hartwell; thence through the villages of Wyoming and Glendale, Hamilton County,

Ohio, through Hamilton and Butler Counties, Ohio, and to and into the City of Hamilton, Butler County, Ohio.

2. The plaintiff The Cincinnati & Hamilton Traction Company is the owner of said electric street railway as the successor in title to The Millcreek Valley Street Railroad Company, The Cincinnati,

3 and The Cincinnati Inclined Plane Railway Company, all corporations organized under the laws of the State of Ohio.

Prior to September 30, 1902, the plaintiff The Cincinnati & Hamilton Traction Company, and its predecessors in title, operated said line of electric street railway and on September 30, 1902, it leased said line of street railway and all of its property, rights, privileges, and franchises, to The Cincinnati Interurban Company, an Ohio corporation, and said The Cincinnati Interurban Company continuously operated said line of electric street railway from the date of said lease until on or about July 5, 1905, on which date it duly transferred, conveyed and assigned all of its right, title and interest in and under said lease to the plaintiff The Ohio Traction Company, and said The Ohio Traction Company has continuously operated said line of street railway since said July 5, 1905, and is now in operation thereof.

3. Said line of electric street railway over and along Erkenbrecher Avenue in the City of Cincinnati from Vine Street to Carthage Avenue was constructed and has been and now is operated under and by virtue of authority granted by the trustees of the Zoological Land Syndicate given April 6, 1889, said trustees being at that time the sole owners of that parcel of ground which is now known as Erkenbrecher Avenue; and said Erkenbrecher Avenue was subsequently dedicated as a street and accepted subject to said railway grant.

4. Said line of electric street railway over and along Carthage Avenue or Turnpike and Carthage Turnpike from Erkenbrecher Avenue, the intersection of Erkenbrecher Avenue and Carthage Turnpike being also the intersection of Ludlow Avenue and Carthage Turnpike, to the northern terminus of said Carthage Turnpike at or near the County Fair grounds, which point is in the former village of Carthage and is

4 now within said city of Cincinnati, was constructed and has been and now is operated under and by virtue of a grant made by the Board of County Commissioners of Hamilton County, Ohio, to The Cincinnati Inclined Plane Railway Company, the predecessor in title to the plaintiffs as aforesaid, on or about March 23, 1889; said grant conferred upon the said The Cincinnati Inclined Plane Railway Company, and its successors and assigns, the right to construct and operate said electric street railway over the route covered thereby in perpetuity, and to charge cash fares of fifteen cents for a single trip between said village of Carthage and Fountain Square in the City of Cincinnati and ticket fares at the rate of eight for one dollar between said points. Said grant was duly accepted by said The Cincinnati Inclined Plane Railway

Company and thereby became a contract between the County of Hamilton and said The Cincinnati Inclined Plane Railway Company and the plaintiffs herein as successors in title to said The Cincinnati Inclined Railway Company. Said grant of said Board of County Commissioners was made at the special request of the Council of the village of Carthage by resolution unanimously adopted by said Council on February 12, 1889.

5. In the year 1901 the validity of the grant last aforesaid made by the Board of County Commissioners of Hamilton County, Ohio, was at issue in an action in the Circuit Court of Hamilton County in which the State of Ohio ex rel. Harry M. Hoffheimer, Prosecuting Attorney of Hamilton County, Ohio, was plaintiff and the said The Millcreek Valley Street Railroad Company, the predecessor in title of the plaintiffs herein, and The Cincinnati Street Railway Company were defendants, said cause being numbered 3415 on the docket of said Court; on January 26, 1904, said Circuit Court of said Hamilton County rendered its judgment therein as follows:

"This cause came on to be heard upon the pleadings, evidence and arguments of counsel, and the court, being fully advised in the premises, upon consideration thereof finds each and all the issues joined in favor of the defendants and each of them. And the Court further finds that the grant to The Cincinnati Inclined Plane Railway Company by the Board of County Commissioners of Hamilton County, Ohio, on the 23rd day of March A. D. 1889, as set forth as Exhibit 4 to the amendment to the answer of The Millcreek Valley Street Railroad Company filed herein March 2nd, 1903, was not a grant of an extension of the line of railway then and theretofore operated by The Cincinnati Inclined Plane Railway Company on Vine Street in the city of Cincinnati, but that the same was a distinct and independent grant, upon the terms therein set forth, to The Cincinnati Inclined Plane Railway Company of the right to construct, maintain and operate a street railroad in the Carthage turnpike; that the said grant was duly accepted by the grantee therein named, and that the defendant, The Millcreek Valley Street Railroad Company, has become the owner of the street railroad therein provided for, and all of the right and franchise to maintain and operate the said street railroad as in said resolution provided.

"Wherefore it is considered by the court that the petition in this cause be dismissed and that the defendants and each of them recover judgment against the plaintiff for their costs herein expended, taxed at \$—.

"To all of which the plaintiff excepts."

Proceedings in error to said judgment were prosecuted by the State of Ohio to the Supreme Court of Ohio and the aforesaid judgment of the Circuit Court of Hamilton County was affirmed by the Supreme Court of Ohio on March 20, 1906, 74 O. S. 453; the Supreme Court of Ohio is the court of last resort in the State of Ohio and said judgment is unreversed and unmodified and is in full force and effect.

6. Said electric street railway line over and along Carthage Avenue or Turnpike and Carthage Turnpike, formerly called Main Street, and Lockland Avenue, from the northern terminus of the said Carthage Turnpike in the former village of Carthage to the north corporation line of said former village, was constructed and has been and now is operated under and by virtue of an ordinance passed by the Council of said Village of Carthage on October 7, 1894, granting to The Cincinnati Inclined Plane Railway Company,

the predecessor in title to plaintiffs herein, the right to construct and operate said electric street railway over the route aforesaid, and the rates of fare prescribed by said ordinance were ten cents in cash between any point in the said village of Carthage and the intersection of Fifth & Walnut Streets in the City of Cincinnati, or twelve tickets for one dollar. Said grant was duly accepted by said The Cincinnati Inclined Plane Railway Company and thereby became a contract between said village of Carthage and its successor, The City of Cincinnati, and said The Cincinnati Inclined Plane Railway Company and its successors in title, the plaintiffs herein.

7. Said line of electric street railway on Wayne Avenue, also called Anthony Wayne Avenue, from the south corporation line of the former village of Hartwell to the north corporation line of the City of Cincinnati, which is the north corporation line of the said former village of Hartwell, was constructed and has been and now is operated under and by virtue of an ordinance passed by the Council of said village of Hartwell on September 16, 1896, granting to the said The Cincinnati Inclined Plane Railway Company, predecessor in title to the plaintiffs herein, the right to construct and operate said electric street railway over the route aforesaid; the rate of fare prescribed by said ordinance was ten cents in cash between any point in the said village of Hartwell and the corner of Fifth & Walnut Streets in the City of Cincinnati. Said grant was duly accepted by said The Cincinnati Inclined Plane Railway Company and thereby became a contract between said village of Hartwell and its successor, The City of Cincinnati, and said The Cincinnati Inclined Plane Railway Company and its successors in title, the plaintiffs herein.

8. Said line of electric street railway from the intersection of Wayne, also called Anthony Wayne, Avenue and Woodbine, formerly called Rural, Avenue, westwardly over said Woodbine or Rural Avenue and De Camp Avenue to the Carthage Turnpike, was constructed and has been and now is operated under and by virtue of an ordinance passed by the Council of the village of Hartwell May 14, 1900, granting to The Millcreek Valley Street Railroad Company, predecessor in title to the plaintiffs herein, the right to construct and operate said electric street railway over the route aforesaid; the rates of fare prescribed by said ordinance between said village of Hartwell and Fountain Square in the City of Cincinnati were ten cents cash or twelve tickets for one dollar. Said grant was duly accepted by said The Millcreek Valley Street

Railroad Company and thereby became a contract between said Village of Hartwell and its successor, The City of Cincinnati, and said The Millcreek Valley Street Railroad Company and its successors in title, the plaintiffs herein.

9. Said line of electric street railway over and along Carthage Turnpike, formerly known as the Hamilton, Springfield and Carthage Turnpike, also called the Springfield Turnpike, from the intersection of De Camp Avenue and said Carthage Turnpike to the northern boundary of said City of Cincinnati, formerly the northern boundary of said village of Hartwell, was constructed and has been and now is operated under and by virtue of a grant from the Board of County Commissioners of Hamilton County, Ohio, to The Millcreek Valley Street Railroad Company, predecessor in title to the plaintiffs herein, made on March 14, 1900, conferring upon the said The Millcreek Valley Street Railroad Company, predecessor in title to the plaintiffs herein, the right to construct and operate said electric street railway over said route aforesaid. Said grant was duly accepted by said The Mill Creek Valley Street Railroad Company and thereby became a contract between the county of Hamilton and said

8 The Millcreek Valley Street Railroad Company and the plaintiffs herein as successors in title to said The Millcreek Valley Street Railroad Company. The right to operate said electric street railway over and along said Hamilton, Springfield and Carthage Turnpike was also secured to plaintiffs herein under and by virtue of a contract dated March 19, 1895, by and between the Hamilton, Springfield & Carthage Turnpike Company, a corporation, the then owner of said Turnpike and The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, predecessor in title to the plaintiffs herein.

10. The aforesaid villages of Carthage and Hartwell were at the time of passing the ordinances and making the grants aforesaid municipal corporations, classed as villages under the law of the State of Ohio, but have since become by annexation a part of the defendant, The City of Cincinnati; the aforesaid County of Hamilton was at the time of making the grants made by it as aforesaid, and still is, a political subdivision of the State of Ohio; and the Councils of said villages and the Board of County Commissioners of said County were the authorized officials of said villages and said County under the laws of the State of Ohio to make the grants aforesaid.

11. Each and all of the aforesaid grants, ordinances and contracts are in full force and effect and unexpired. ✓

12. The plaintiffs and each and all of their predecessors in title, as aforesaid, have expended large sums of money in the construction, reconstruction, repair, maintenance and operation of said electric street railway over the routes aforesaid, upon the faith of and in reliance upon each and all of the grants, ordinances and contracts aforesaid, and of the judgment hereinabove set forth; the former villages of Hartwell and Carthage, and their successor The City of Cincinnati, and said County of Hamilton, permitted and acquiesced in the construction of said electric street railway knowing the same was being constructed upon the faith of and upon reliance upon the grants, ordinances and contracts

9

aforesaid, and have permitted and acquiesced in the reconstruction, repair, maintenance and operation thereof for many years and until the time of the grievance hereinafter set forth; and the said villages and County and the citizens and inhabitants thereof have received the benefit of the construction, reconstruction, repair, maintenance and operation of said road by the plaintiffs herein and their predecessors in title, well knowing that the said construction, reconstruction, repair, maintenance and operation were made and done by the plaintiffs and their predecessors in title upon the faith of and in reliance upon the grants, ordinances, contracts and judgment aforesaid.

13. Notwithstanding the contract rights of plaintiffs as hereinabove set forth, the defendant, The City of Cincinnati, on or about the 21st day of April, 1914, passed a certain alleged ordinance entitled, "An Ordinance No. —. Specifying the terms and conditions upon which the Cincinnati and Hamilton Traction Company and The Ohio Traction Company, as its lessee, may operate street cars on certain streets of the City, and authorizing the City Solicitor to take legal proceedings to enforce this ordinance," a copy of which is hereto attached, marked Exhibit A, and made a part hereof; in and by said ordinance said City repudiated the grants aforesaid and thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of Article 1, Section 10, of the Constitution of the United States, and the enforcement of said ordinance will deprive plaintiffs of their property without due process of law and without compensation, in violation of the Constitution of the United States and particularly Article XIV in amendment thereof.

10 14. The defendant, The City of Cincinnati, by its agents and employes, under the pretended authority of the ordinance of the City of Cincinnati aforesaid, threaten to and will, unless restrained by order of this Court, interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof, which will cause great and irreparable injury to these plaintiffs for which they have no adequate remedy at law.

Wherefore plaintiffs pray that the Court decree said ordinance passed April 21, 1914, to be null and void, and that the defendant, The City of Cincinnati, and its officers, agents and employes, be enjoined by a restraining order, preliminary injunction, and final decree, from interfering or attempting to interfere in any way with the maintenance and operation, or either, by the plaintiffs, or either of them, of said line of electric street railway or any part thereof; and from enforcing or attempting or taking any steps to enforce the pretended ordinance of the City of Cincinnati, aforesaid, or any part thereof, and from taking any action which would alter, impair, limit, or destroy, the right and title of plaintiffs under their said grants and contracts.

Plaintiffs further pray that they may have a writ of subpoena to defendant, commanding it to appear before this Court and answer

this bill of complaint, but not under oath, answer under oath being hereby waived, and that plaintiffs may have such other and further relief as the nature of the case may require and as they may be entitled to in equity.

A. C. CASSATT,

Solicitor for the Cincinnati & Hamilton Traction Company.

LAWRENCE MAXWELL,

ELLIS G. KINKEAD,

GEORGE H. WARRINGTON,

Solicitors for The Ohio Traction Company.

11

STATE OF OHIO,

County of Hamilton, ss:

Walter A. Draper, being first duly sworn, says that he is Secretary of The Ohio Traction Company, one of the plaintiffs herein, and that the allegations contained in the foregoing Bill of Complaint are true.

WALTER A. DRAPER.

Sworn to before me and subscribed in my presence this 27th day of April, 1914.

DENIS J. DOWNING,

Notary Public, Hamilton County Ohio.

12

An Ordinance No. —.

Specifying the terms and conditions upon which the Cincinnati and Hamilton Traction Company and The Ohio Traction Company, as its lessee, may operate street cars on certain streets of the city, and authorizing the City Solicitor to take legal proceedings to enforce this ordinance.

Whereas, The Ohio Traction Company, as lessee of The Cincinnati and Hamilton Traction Company, is now operating street cars on certain streets of the City of Cincinnati; and

Whereas, on portions of the streets so occupied and used alleged grants have heretofore expired and on other portions, including that part of Carthage Pike formerly known as Springfield Pike there never have been any grants and said companies have no longer any right to occupy the same; now, therefore,

Be it ordained by the Council of the City of Cincinnati, State of Ohio:

SECTION 1. That upon the terms and conditions in this ordinance specified, and upon no other, permission is hereby granted to said The Cincinnati and Hamilton Traction Company and to The Ohio Traction Company, as its lessee, to continue from day to day only from the date on which this ordinance becomes effective to operate street cars on the following streets, to-wit:

Erkenbrecher Avenue from Vine Street and Erkenbrecher Avenue to Carthage Avenue; thence north on Carthage Avenue and

Carthage Pike (formerly called Main Street) to Lockland Avenue, excepting the portions in the municipalities of St. Bernard and Elmwood Place; thence north on Lockland Avenue and Anthony Wayne Avenue to the northern boundary of the City through the district formerly known as Hartwell; and also from the intersection of Anthony Wayne and Woodbine (formerly called Rural) Avenues westwardly over Woodbine Avenue and over DeCamp Avenue to Carthage (formerly called Springfield) Pike; thence north on said Carthage Pike to the northern boundary of the City in the District formerly known as Hartwell; on the tracks now existing in said streets.

Section 2. On and after the taking effect of this ordinance the operation of street cars on said streets shall be subject to the same terms and conditions as existed under the prior alleged grants, if any, so far as not inconsistent with the provisions of this ordinance, and shall be subject to the following conditions:

A. That the necessary arrangements be made to operate cars from the aforesaid northern boundary of the City over said streets to Sixth and Walnut Streets in substantially the same manner and with substantially the same frequency as now, and as a continuous line; and that street cars shall be operated.

B. That for a continuous trip between any two points between the aforesaid northern boundary of the City and Sixth and Walnut streets the fare for each passenger shall not exceed five (5c) cents except that for children under ten years of age the fare shall not exceed three (3c) cents, and children in arms shall be carried free.

C. That the necessary arrangements be made so that without additional charge passengers on street cars operated on the streets mentioned in Section 1, and passengers on street cars operated by The Cincinnati Traction Company may transfer to and from either to the other; but transfers given hereunder shall be good only on the first street car available and on one not going in a substantially parallel and opposite direction.

14 D. That during the operation of this ordinance the Director of Public Service may make from time to time further and reasonable regulations as to the character, mode, manner and frequency of service and maintenance of the street cars and tracks.

Section 3. Should it be adjudged that on only a portion or portions of the said streets now occupied by the tracks of said The Cincinnati and Hamilton Traction Company the right to operate street cars has never been granted, or if granted has ceased to exist, then this ordinance shall be construed to forbid the further operation of street cars on such portions except on the compliance by the said The Cincinnati and Hamilton Traction Company and The Ohio Traction Company and each of them with all of the terms and conditions specified in this ordinance.

Section 4. The continuing by said companies, or either of them, to operate street cars on said streets shall be deemed an acceptance of this ordinance and of all the terms hereof.

Section 5. In case the Cincinnati and Hamilton Traction Company and The Ohio Traction Company, or either of them, refuse or fail to comply with the terms of this ordinance upon the tak-

ing effect hereof, the City Solicitor shall be, and he is hereby authorized and directed to take such legal proceedings as may be proper and necessary to enforce the provisions of this ordinance, or to require the said companies and each of them to abandon the streets covered by this ordinance, and to remove their tracks from said streets.

Section 6. Should The Cincinnati and Hamilton Traction Company and The Ohio Traction Company, or either of them,
15 surrender or transfer all or any part of their rights, if any, to operate street cars over all or any part of the aforesaid streets, to The Cincinnati Street Railway Company, or to The Cincinnati Traction Company, either or both, this ordinance shall apply also to the two last named companies, either or both as the case may be.

Section 7. Should any part of this ordinance be adjudged invalid, such adjudication shall not effect the validity of the remainder of this ordinance.

Section 8. This ordinance and any rights granted or acquired hereunder are subject to repeal, amendment, or revocation in whole or in part at any time at the will of Council.

Section 9. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed April 21st, A. D., 1914.

L. J. DAUNER,
President of Council.

Attest:

FRED SCHNELLER, *Clerk.*

16 *Motion for Preliminary Injunction.*

Filed May 16, 1914.

The plaintiffs, The Cincinnati & Hamilton Traction Company and The Ohio Traction Company, hereby move the Court to grant a preliminary injunction in this cause as prayed for in the petition herein.

A. C. CASSATT,
*Attorney for The Cincinnati &
Hamilton Traction Company,*
LAWRENCE MAXWELL,
ELLIS G. KINKEAD,
GEORGE H. WARRINGTON,
Attorneys for The Ohio Traction Company,

17 *Answer.*

Filed May 18, 1914.

To the Honorable Judges of the United States District Court for the Southern District of Ohio, Western Division:

1. Defendant, the City of Cincinnati, enters its appearance herein specially and for the sole purpose of objecting to the court's juris-

diction, and says that it is apparent upon the face of the Bill of Complaint that the relief sought by plaintiffs is to enjoin proceedings by defendant, the City of Cincinnati, in the State courts.

2. Defendant further says that the facts set out in the bill of complaint do not constitute a cause of action in equity or at law against this defendant, and further and in the alternative that it so appears also, if plaintiffs are entitled to any relief, that their remedy at law is full, adequate and complete.

3. For further answer to the Bill of Complaint, defendant, the City of Cincinnati, says that it is a municipal corporation organized and existing under the laws of the State of Ohio, and that it is located in Hamilton County in said State. Defendant admits that The Cincinnati and Hamilton Traction Company and The Ohio Traction Company are each corporations organized and existing under the laws of Ohio, and are citizens of the said State of Ohio and residents of the Southern District and western Division thereof.

18 Defendant admits that The Ohio Traction Company, as lessee of The Cincinnati and Hamilton Traction Company, is now operating a line of electric street railway extending from the intersection of Vine Street and Erkenbrecher Avenue, in the City of Cincinnati over and along Erkenbrecher Avenue to Carthage Avenue; thence over and along said Carthage Avenue, also known as Carthage Turnpike, and Carthage Pike, through St. Bernard and Elmwood Place, and through that part of the City of Cincinnati formerly the Village of Carthage to Lockland Avenue; thence north on Lockland Avenue and Anthony Wayne Avenue to the northern boundary of the City of Cincinnati, through the district formerly the Villages of Carthage and Hartwell, and thence to and into the Village of Lockland; and also from the intersection of Anthony Wayne Avenue and Woodbine Avenue, formerly called Rural Avenue, westwardly over Woodbine Avenue and over De camp Avenue to Carthage Turnpike, formerly called Springfield Turnpike or Pike; thence north on said Carthage Turnpike to the northern boundary of the City of Cincinnati in the District formerly the Village of Hartwell, thence through the Villages of Wyoming and Glendale. Defendant says that it is without knowledge as to the title or the ownership of The Cincinnati and Hamilton Traction Company to the said line of electric street railway, excepting as in this Answer set out; and defendant denies that the plaintiffs, or either of them, have any right to operate said line of electric street railway; and defendant says that it is without knowledge of the right, if any, of the plaintiffs, and each of them, to own or operate a line of electric street railway outside of the limits of the City of Cincinnati, and
19 therefore denies the same.

4. Defendant is without knowledge, excepting as in this Answer set out, as to the ownership or succession in title, or leasing or operation, alleged in the second paragraph of the Bill of Complaint, and therefore denies the same, excepting that defendant admits that The Mill-creek Valley Street Railroad Company, and The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company were each corporations organized under the laws of the State

of Ohio, and that on or about September 30, 1902, The Cincinnati and Hamilton Traction Company operated said line of electric street railway, and that after said date The Cincinnati Interurban Company, an Ohio corporation, operated said line of electric street railway until on or about July 5, 1905, and that after said date The Ohio Traction Company operated said line and is now operating the same.

5. To so much of the Bill of Complaint as sets out plaintiffs' claim of right to operate said line of electric street railway over Erkenbrecher Avenue defendant answering denies that such right was ever granted to plaintiffs or either of them or their predecessors in title, or conveyed to plaintiffs or either of them to operate said line over all, or every, or any, part of Erkenbrecher Avenue between Vine Street and Carthage Avenue, or to operate said line without a franchise from defendant; and defendant says that no such franchise was ever granted to plaintiffs or either of them or to their predecessors in title or conveyed to them; and defendant further says that said portion of Erkenbrecher Avenue was duly dedicated to it as a public street, and accepted by defendant as such, but that such dedication was not subject to any right in plaintiffs or plaintiffs' predecessors in title as alleged in the Bill of Complaint.

20 6. To so much of the Bill of Complaint as sets out plaintiffs' claim of right to operate said line of electric street railway over Carthage Turnpike (Pike or Avenue) between Erkenbrecher Avenue and the north end of the old Carthage Turnpike defendant answering, says that on or about March 23, 1889, the County Commissioners of Hamilton County passed a resolution in the words and figures set out in Exhibit "A", hereto attached and made part hereof, and that said resolution or grant was requested by the Council of the village of Carthage in the manner set out in Exhibit "B", hereto attached and made a part hereof. Defendant admits that an action was brought by the State of Ohio on the relation of the Prosecuting Attorney of Hamilton County, against The Milcreek Valley Street Railroad Company in the then Circuit Court of Hamilton County, and numbered 3415 on the docket of said Court, and that on January 6, 1904, a judgment was rendered in said cause in the words and figures set out in Exhibit "C", hereto attached and made part hereof, and that said judgment by said Circuit Court was affirmed by the Supreme Court of Ohio, March 20, 1906, 74 O. S., 453; but defendant denies that the validity or extent of the grant, Exhibit "B", by the Board of Commissioners of Hamilton County was at issue in said action, or adjudicated therein, and defendant further avers that said judgment has no effect on the questions at issue herein. Defendant says that for about six thousand (6000) feet at the south end of such portion of said line on said Carthage Pike said line lay within the territory of this defendant and the former Villages of Clifton and Avondale, now part of defendant; and that the north end of such portion of said line for about four thousand and three hundred (4300) feet lay in the Village of Carthage; and that as to such portions of said line said resolution,

21 Exhibit "A", and said adjudication granted or established as against defendant no right, temporary or perpetual, to operate or maintain said lines without appropriate action by said municipal corporations. Defendant says that on March 19, 1889, the Village of Carthage passed a resolution in the words and figures of Exhibit "D", hereto attached and made a part hereof; and that any rights granted by said resolution expired on the 19th day of March, 1914.

7. To so much of the Bill of Complaint as sets out the plaintiffs' claim of right to operate said line of electric street railway from the north end of the Carthage Turnpike over Carthage and Lockland Avenues to the north line of the Village of Carthage, defendant says that without any authority an extension of the said line from the north end of the Carthage Turnpike was built to the Carthage Fair Grounds about two hundred (200) feet to the north, and that thereafter the Village of Carthage, by ordinance passed August 7, 1894, No. 1039, in the words and figures of Exhibit "E", hereto attached and made a part hereof, granted an extension to the north corporation line of said Village; and that any right to operate thereunder expired on the 19th day of March, 1914.

8. To so much of the Bill of Complaint as sets out plaintiffs' claim of right to operate said line of electric street railway over the streets named in the former Village of Hartwell, defendant answering, says that the former Village of Hartwell passed an ordinance September 16, 1896, in the words and figures set out in Exhibit "F", hereto attached and made a part hereof; and that on May 14, 1900, the said Village passed an ordinance in the words and figures set out in Exhibit "G", hereto attached and made a part hereof. Defendant says that the western boundary of said village was and the western boundary of defendant is a line in the said Carthage Pike, formerly known as the Springfield Pike, and that the east track of said line of electric street railway and portions of the west track were laid and are maintained and said line operated thereover in the said village and now in the City of Cincinnati, without any right or authority of law; and defendant denies that any such right or authority was ever granted or conveyed to plaintiffs, or either of them, to operate said line without a franchise from defendant. Defendant further says that any right granted by said ordinances, Exhibits "F" and "G" expired on the 19th day of March, 1914.

9. Defendant admits that the Village of Carthage and the Village of Hartwell were, at the times aforesaid, and before annexation to defendant, municipal corporations classed as Villages under the law of the State of Ohio, and that for more than a year last past they have become, by annexation, part of the City of Cincinnati, and that the County of Hamilton, at all times mentioned herein, was and is a County of the State of Ohio.

10. Defendant denies the averments in Paragraph 11 of the Bill of Complaint.

11. Defendant is without knowledge as to the amounts of money expended as alleged in Paragraph 12 of the Bill of Complaint, and

therefore denies the same; and defendant further denies any estoppel as pleaded in said paragraph.

12. Defendant admits that the Ordinance attached as Exhibit "A" to the Bill of Complaint herein was passed by the Council of the City of Cincinnati April 21, 1914, and was filed with the Mayor of Cincinnati April 24th, and on April 27th approved by him. Defendant denies that in said Ordinance defendant repudiated or impaired or attempted to impair any grants or obligations or contracts, or that it will deprive plaintiffs, or either of them, of any of their property without due process of law and without compensation, in violation of any provision of the Constitution of the United States, or otherwise.

23 13. The defendant denies that under the authority of said Ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs, or either of them, of said electric street railway, or cause any damage or injury of any kind to the plaintiffs, or either of them, and defendant avers that the enforcement of said Ordinance is only authorized and will only be sought by and through an order of a Court of competent jurisdiction first had and obtained, and after a hearing on due and reasonable notice to all interested parties.

14. Defendant denies each and every allegation in the Bill of Complaint contained not herein expressly admitted to be true.

Wherefore defendant, having fully answered, prays that it be hence dismissed with its costs in this behalf incurred.

CITY OF CINCINNATI,
By WALTER M. SCHOENLE,
City Solicitor.

WALTER M. SCHOENLE,
Solicitor of Cincinnati,
CONSTANT SOUTHWORTH,
Assistant Solicitor,
Counsel for Defendant.

STATE OF OHIO,
Hamilton County, ss:

Walter M. Schoenle, being first duly sworn, deposes and says that he is Solicitor of the City of Cincinnati and that the facts and allegations in the foregoing Answer contained are true.

WALTER M. SCHOENLE.

Sworn to before me and subscribed in my presence this 18th day of May, 1914.

[SEAL.]

RAYMOND C. DIECKMAN,
Notary Public in and for
Hamilton County, Ohio.

The following appears of record in Vol. 18, pages Nos. 522 and 523, County Commissioners' minutes, March 23, 1889:

By the Board:

Resolved, That the Application of the Cincinnati Inclined Plane Railway Company for the permission to use and occupy with double tracks and with necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage Turnpike, commencing at a point at or near its intersection with Ludlow Avenue and running thence upon and along said Carthage Turnpike to its northern terminus at or near the county fair grounds at Carthage, so as to enable the said company to furnish continuous rapid and safe transportation between Fountain Square, in Cincinnati, and the Village of Carthage, in this County, be and the same is hereby granted upon the following terms and conditions:

1st. That said company shall replace and restore the said portion of said turnpike in as good order and condition as they find it, at its own expense.

2nd. That said company shall pay and save the County harmless from any and all damages for which it may be liable for any injury or inconvenience to persons or property by reason of construction or operation of said road over said portion of said turnpike, and the top of the rails must in no case project above the level of the surface of the pike.

3rd. The work to be done to the satisfaction of the County engineer and County Commissioners; any differences arising between said engineer and the company to be submitted to the County Commissioners for a fair and equitable adjustment.

25 4th. The tracks to be laid on each side of said turnpike, leaving a clear space of twenty feet in the center of said turnpike for travel, except over the bridges, or as may be otherwise ordered by the council in the villages through which said road is located.

The center of the poles supporting lateral wires to be placed at no points except eighteen inches within the curb line, allowing twelve feet for sidewalks, and to be located in such manner as to cause no obstruction to the vehicular or pedestrian travel now or in the future.

5th. The said electric road to be constructed, completed and put in operation within twelve months from the time said company shall have acquired the legal right to so construct, excluding, however, from the computation, such periods of time during which the work of construction may be delayed without any fault of said company; the work of construction must be commenced, however, within ninety days from the date of the passage of this resolution.

6th. The rates of fare shall not exceed the following:

Fifteen cents cash for a single trip between Fountain Square and Carthage or Elmwood or return.

Ten cents cash for a single trip between Fountain Square and St. Bernard or Ludlow Grove or return.

Ten cents cash for a single trip between the Zoological Garden and Carthage or Elmwood or return.

Five cents cash for a single trip between the Zoological Garden and St. Bernard or Ludlow Grove or return.

The said company shall, however, keep for sale upon its cars tickets in packages as follows:

Eight tickets for one dollar, each ticket to be good for a single trip between Fountain Square and Carthage or Elmwood or return.

Twelve tickets for one dollar, each ticket to be good for a single trip between Fountain Square and St. Bernard or Ludlow

26 Grove or return.

7th. The bridge over the canal in St. Bernard to be widened in such manner and at such cost as may be agreed upon between said Company and said County Commissioners; the cost, however, when agreed upon, is to be paid equally by said company and said Commissioners.

8th. Said company shall pay into the county treasury on the first day of January, 1891, the sum of \$500.00; on the first day of January, 1892, the sum of \$500.00, and \$1000 on the first day of January of each succeeding year so long as the said turnpike shall remain a toll road under the charge of said County Commissioners; said sum to be applied by said County Commissioners in making the necessary repairs to said turnpike; and if said amounts so agreed to be paid by said company be not paid when the same are due and demand made therefor by the County Commissioners, that the County Commissioners have the right summarily to stop the running of the cars, and in the event of such stoppage no liability for damages shall accrue.

9th. The Cincinnati Inclined Plane Railway Company shall, on or before April 10, 1889, file its bond to be approved by the County Solicitor, in the penal sum of \$10,000.00 conditioned upon the faithful performance of this Contract.

10th. The County Commissioners to cause the removal of any and all telegraph or telephone poles which may interfere with the operation of said electric road.

Gosling—Aye. Staley—Aye. Anthony—Aye.

"Whereas, This Council, at a special meeting held on the 29th day of January, 1889, adopted certain resolutions in reference to the construction of an electric street railway over the Carthage turnpike from Cincinnati to Carthage; and

"Whereas, Upon full investigation, we are satisfied that the Cincinnati Inclined Plane Railway Company are now operating a railroad to the Zoological Garden, which they propose to extend to Carthage, and which, if so extended, will furnish to our citizens the most direct and shortest route to and from the city; therefore

"Resolved, That the honorable Board of County Commissioners be, and they are hereby requested to grant to said the Cincinnati Inclined Plane Railway Company the right of way to construct an electric street railway over the said Carthage turnpike, as asked in their application to said County Commissioners."

February 13, 1889.

This cause came on to be heard upon the pleadings, evidence and arguments of counsel, and the court being fully advised in the premises, upon consideration thereof finds each and all of the issues joined in favor of the defendants and each of them. And the Court further finds that the grant to The Cincinnati Inclined Plane Railway Company made by the Board of County Commissioners of Hamilton County, Ohio, on the 23rd day of March, A. D. 1889, as set forth as Exhibit 4 to the amendment to the answer and the additional answer of The Millcreek Valley Street Railroad Company filed herein March 2nd, 1903, was not a grant of an extension of the line of railway then and theretofore operated by The Cincinnati Inclined Plane Railway Company on Vine Street in the City of Cincinnati, but that the same was a distinct and independent grant upon the terms therein set forth, to the Cincinnati Inclined Plane Railway Company of the right to construct, maintain and operate a street railroad in the Carthage turnpike; that the said grant was duly accepted by the grantee therein named, and that the defendant, The Millcreek Valley Street Railroad Company, has become the owner of the street railroad therein provided for, and of all the right and franchise to maintain and operate the said street railroad as in said resolution provided.

Wherefore it is considered by the Court that the petition in this cause be dismissed and that the defendants and each of them recover judgment against the plaintiff for their costs herein expended, taxed at \$—.

To all of which the plaintiff excepts.

Entered January 6, 1904.

Resolved, That the application of the Cincinnati Inclined Plane Railway Company for permission to occupy with double or single tracks with the necessary appendages and appurtenances of an overhead electric street railway system, the Carthage turnpike and either of the roads leading to the Carthage Fair Grounds, and to operate its said electric road over and along the same through the village of Carthage, be and the same is hereby granted upon the following terms and conditions, to wit:

First. The rails to be laid down on said route shall have an inside tram of at least four inches.

Second. The tracks shall be laid in the middle of the streets or roadways, and where double tracks are laid, they shall be as near together as possible.

Third. All side-tracks, turntables, curves or connection tracks shall be constructed and located under the supervision and direction of council.

Fourth. The poles or posts shall be of iron or wooden poles; the iron posts to be of the same plan and pattern as those prescribed by the City of Cincinnati; the wooden poles, if used, are to be dressed and neatly painted to the satisfaction of the council of the village.

Fifth. Said railroad to be completed from the Hamilton County Fair Grounds to the City of Cincinnati within twelve months from the acceptance of the grant by said company (delays caused by legal proceedings or from causes not the fault of said company or its agents to be excluded in the computation of time), otherwise said grant to be void.

Sixth. Said grant to be accepted in writing within thirty days from the passage of this resolution, otherwise to be null and void and of no effect.

Seventh. Said tracks to be put in without unnecessary delay or obstruction to the public travel, and the streets and roadways to be put in good repair as rapidly as the said tracks are laid.

March 19, 1889.

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EXHIBIT "E".

An Ordinance, No. 1039, to Provide for the Extension of the Cincinnati Inclined Plane Railway from the Northern Terminus of the Carthage Pike Over Main Street and Lockland Avenue to the North Corporation Line of the Village of Carthage.

Be it ordained by the council of the village of Carthage, Hamilton County, Ohio, as follows:

SECTION 1. That, whereas, application has been made in due form as required by law by the Cincinnati Inclined Plane — Company for permission to extend its tracks over and along Main Street and Lockland Avenue of the said village, from the northern terminus of the Carthage pike therein to the north corporation line of said village, and to construct its railway and operate its cars over and along said streets by means of electricity, together with all necessary turn-outs, switches, appendages and appurtenances incident to the proper construction and operation of its railway system; and

Whereas, There has been filed with this council the written consent of the owners of more than one-half of the front feet of the lots and lands abutting on each of said streets consenting and agreeing to said extension and construction by this council, and,

Whereas, Such extension is deemed beneficial to the public.

Now, therefore, permission is hereby granted to the said The Cincinnati Inclined Plane Railway Company to use and occupy by double tracks with the necessary switches connection at the north

end of said tracks and with appendages and appurtenances incident to the proper operation of its electric railway system over Main Street and Lockland Avenue, commencing at the northern terminus of the Carthage pike in said village, and over and along said
32 Main Street and Lockland Avenue to the north corporation line of said village.

Said extension is granted and said tracks are to be laid on the following terms and conditions, to wit:

First. Said tracks shall occupy the center of the streets and shall be placed as near together as practicable, allowing for the safe and convenient passage of cars therein.

Second. Said company shall lower its tracks on said street and avenue wherever necessary to conform to the established grade of said street to the satisfaction of the engineer of the village.

Third. The ties shall be laid on not less than six inches of broken stone well packed.

Fourth. The rails to be used shall be of the same pattern as now laid on Vine Street in the City of Cincinnati, between Molitor and St. Clair Streets, and known as Section B 52, No. 108, being the Johnson girder 52-lb. rail.

Fifth. Said company shall use in said extension iron poles or neatly painted octagonal wooden poles and replace the present wooden poles as far as the present wooden poles give out through the entire village.

Sixth. That said company shall run sufficient cars to accommodate the traffic through without change from the corner of Fifth and Walnut Streets in the City of Cincinnati, to the north corporation line of said village; provided, however, that said cars between the hours of 5 o'clock A. M. and 5 o'clock P. M., shall be run at intervals not to exceed eight minutes; and between the hours of 6 o'clock P. M., and 12 o'clock P. M. shall be run at intervals not to exceed fifteen minutes; and provided, further, that the first car shall leave the north corporation line of said village not later than 6 o'clock A. M., and the last through car shall leave the corner of Fifth and Walnut Streets in Cincinnati not earlier than 11 o'clock P. M.
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Seventh. That the charge for transportation of passengers over the line of said company from the corner of Fifth and Walnut Streets in the City of Cincinnati to any point in the village of Carthage shall not exceed ten cents cash fare; and from the main entrance to the Zoological Garden in the City of Cincinnati to any point in the village of Carthage shall not exceed five cents cash fare; and for children under the age of three years not to exceed one-half of the above rates may be charged. And said company shall place on sale at convenient and accessible places tickets in package or book form good for transportation in either direction from the corner of Fifth and Walnut Streets in the City of Cincinnati to the north corporation line of Carthage, twelve for one (\$1.00) dollar, said tickets to be good until used, on all cars of said company and in hands of any person. And the above rates shall be conspicuously posted in all cars of the company. Provided that the marshal or any other police officer of said village when in full uniform and in the dis-

charge of official duties shall be permitted to ride in the cars of the company without charge; and provided further, that the rates of fare between Fifth and Walnut Streets in Cincinnati and the north corporation line of Carthage shall at no time exceed the rates of fare between said point in Cincinnati and any point north of and beyond the north corporation line of Carthage.

Eighth. That in lowering the tracks to conform to the established grade, and in making the extension of tracks as hereinbefore provided, said company shall cause to be laid underneath the ties of all of said tracks, a layer of broken stone; no stone to be less than two and one-half inches nor greater than four inches in its greatest diameter, said layer of stone to be thoroughly tamped under the ties

and when tamped must have a thickness of not less than six inches. Said company shall replace and restore the said portions of said streets in good order and condition with broken stone and at its own expense, and all of said work shall be under the supervision and subject to the direction and approval of the engineer employed by the village of Carthage and Village Council.

Ninth. The said company, shall pay into the treasury of said Village the sum of \$50.00 on the first Monday of September, 1894, and the sum of \$50.00 in the first Monday of March, 1895, and the first Monday of each succeeding year thereafter, which said sum of money when received and paid into the treasury of the village, shall be credited to the Lockland Avenue repair fund, and shall be applied only by said village in making the necessary repairs to said avenue, and for no other purpose.

Tenth. Within thirty days after the passage of this ordinance, said company shall file its written acceptance of the terms and conditions of the same, and give a satisfactory bond to the council (and to the village solicitor as to form), in the sum of \$2,500.00, conditioned for the faithful compliance of said company with all the terms and conditions of this ordinance and to save the village harmless from any and all claims by reason of the construction and operation of this extension.

SECTION II. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Done at the council chamber in Carthage, Ohio, this 7th day of August, 1894.

35

EXHIBIT "F."

Ordinance No. 611, Granting to the Cincinnati Inclined Plane Railway Company Permission to Extend its Tracks from the South Corporation Line of the Village to the North or West Corporation Lines thereof.

SECTION 1. Be it ordained by the Council of the Village of Hartwell, Hamilton County, Ohio, that permission be and the same is hereby granted to the Cincinnati Inclined Plane Railway Company to extend, construct, maintain and operate the route and tracks of

its present electric street railway system leading to and connected with its incline plane and necessary for the convenient dispatch of its business, from its present terminus at the South corporation line of the village at Wayne Avenue to the north or west corporation lines thereof over and along both or either of the following routes, to-wit:

Wayne Avenue to Section Avenue, thence either north on Wayne Avenue to the north corporation line of the village or west on Section Avenue to the west corporation line of the village, or on Section Avenue to Burns Avenue; thence north on Burns Avenue to the north corporation line of the village, either or both of the above named avenues at the option of the said Cincinnati Inclined Plane Railway Company, with the right to construct and operate all appurtenances incident and necessary to the proper operation of said street railway system.

SECTION 2. Said railway shall be by double tracks and shall occupy as nearly as practicable the east side of Wayne Avenue from the present terminus of said railway to Section Avenue, and from Section Avenue it shall occupy the center of the avenue or avenues upon which said railway shall be constructed, and shall be placed
36 as near together as practicable, allowing for the safe and convenient passage of cars thereon.

Said company shall place said tracks on said avenues to conform to the established grade of the same under the supervision and subject to the approval of the engineer of the village and on grades and lines as designated by said engineer; and said company shall replace and restore the said portion or portions of said avenues that may be disturbed in the construction of said tracks in as good order and condition as they were at the time of said construction, and may use in said restoration the same material as may be displaced.

The ties shall be laid on six inches of broken stone, well packed, the rails to be used in said construction shall be of the same pattern as those now laid on Vine Street, in the City of Cincinnati, between Molitor and St. Clair Streets and known as Section B 52, No. 103, being the Johnson girder 52 pound rail. In case any other rail shall be substituted therefor, it shall be first subjected to the approval of the engineer of said village. The said Company shall use in said construction iron poles or neatly painted wooden poles.

SEC. 3. Said company shall run sufficient cars to accommodate travel to and from the corner of Fifth and Walnut Streets, in the City of Cincinnati, to its northern terminus in said village, provided, however, that said cars between the hours of six o'clock a. m. and six o'clock p. m. shall be run at intervals not to exceed twelve minutes, and between the hours of six o'clock p. m. and twelve o'clock p. m. at intervals not to exceed twenty-four minutes, and provided further that the first car shall leave the northern terminus of said road in the village not later than six o'clock a. m., and the last through car shall leave the corner of Fifth and Walnut Streets in Cincinnati, Ohio, not earlier than 11:30 p. m. Sunday service
37 shall begin one hour later in the morning than on week days.

This clause shall not apply when company is prevented from operating by strikes, legal proceedings or other cause not within its control.

SEC. 4. That the charge for transportation of passengers over the line of said road from the corner of Fifth and Walnut Streets, in the City of Cincinnati, to and from any point in the Village of Hartwell shall not exceed ten cents cash fare, and from the main entrance of the Zoological Gardens, in the City of Cincinnati, to and from any point in said village, shall not exceed ten cents cash fare, provided that a special Zoological Gardens round trip ticket for ten cents shall be issued in such form as the company may determine, and provided further that a local rate of five (5) cents shall be charged from or to any point in the village of Hartwell, to or from any point in the village of Elmwood, or intermediate points; and said company shall place on sale on all cars through single tickets good from Hartwell to Fountain Square, in the City of Cincinnati, or from Fountain Square to Hartwell, at ten cents each, and shall also place on sale on all cars, special Zoological Garden round trip tickets for ten cents, said Zoo tickets to be good only on day of issue on all cars of said company, and in the hands of any person, and the above prescribed rates and conditions shall be posted in all cars of the company.

SEC. 5. Said company shall pay into the treasury of the Village the sum of Fifty Dollars on the first Monday of January, 1897, and Fifty Dollars on the first Monday of July, 1897, and the same amount on the first Monday of January and July of each succeeding year thereafter, which money so paid shall be placed in the treasury of the village to the credit of a repair fund concerning Wayne Avenue from the south corporation line of said village to

38 Section Avenue, and shall be used by said village only in making necessary repairs to that portion of said Wayne Avenue herein designated; and upon any further occupation of streets or avenues hereafter under this ordinance, there shall be paid by said company in like manner and at the same times herein mentioned such additional amount proportioned to the length of route to be hereafter operated hereunder.

SEC. 6. Within 15 days after the passage of this ordinance said company shall file its written acceptance under the terms and conditions of same, and within ninety days thereafter shall complete and put into operation so much of the proposed route and tracks as extend from the present terminus of said road to Section Avenue; provided, however, that said company is not prevented by legal proceedings, strikes, accidents or other causes not within its control; and provided, further, that so much of the grant herein as authorizes the construction of said railway from Section Avenue shall cease and determine unless the said company shall complete and operate the same in accordance with the terms and conditions herein named within two years from the date of the passage of this ordinance.

SEC. 7. That Ordinance No. 609 be and the same is hereby repealed.

SEC. 8. This ordinance shall take effect from and after the earliest period allowed by law.

Passed September 16, 1896.

Ordinance No. 679, Granting to the Millcreek Valley Street Railway Company an Extension of Its Present Street Railroad Route in the Village of Hartwell, Hamilton County, Ohio, from Connections with Its Tracks in Wayne Avenue, Over and Upon the Following Highways and Places, to wit:

Commencing in the highway known as Wayne Avenue at or near the intersection of Wayne and Rural Avenues, thence westwardly from said intersection of said avenues over and upon Rural Avenue to the northeast corner of lot No. ninety-five (95) of Hartwell, by the Hamilton County House Building Association, as recorded in plat book 3, at page 77, of the plat records of said county; thence over and along that portion of a fifty (50) foot strip of land or avenue, lying south of the center line of the avenue shown on said Hamilton County House Building Association's plat of Hartwell, as lying between the south line of lot No. eighty-nine (89) and north line of lot No. ninety-five of said Hamilton County House Building Association's plat of Hartwell; thence over and upon De Camp Avenue to the west corporation line of said village.

Whereas, the Millcreek Valley Street Railroad Company contemplates the construction, operation and maintenance of a street railroad over certain highways in Hamilton and Butler Counties, which shall extend to and from and connect with its present line running over Wayne Avenue in Hartwell; and

Whereas, said company has made application in writing to the Council of the Village of Hartwell to extend its present street railroad line in Wayne Avenue in said village, over and upon Rural and De Camp Avenues, and over and along the south half of a fifty (50) foot strip of land recorded and shown as a street or
40 avenue, lying between lot No. 89 and lot No. 95, of the Hamilton County House Building Association's Hartwell, in plat of Hartwell, recorded in Book 3, at page 77, of Hamilton County, Ohio, plat record and

Whereas, the written consents of a majority of the property owners on the line of said proposed extension of said street railroad within said village as represented by the feet front of the land and lots abutting upon the line of said extension has been given said company, and such consents having been filed with the Village Clerk of said village; and

Whereas, in the opinion of Council said extension of said route will be a public convenience and benefit to the property affected thereby; and

Whereas, said company as part consideration for this grant, expressly agrees to raise, to grade all that portion of Rural and De

Camp Avenues, upon, over, and along which said company shall lay its tracks, and macadamize same; all cost of raising to grade and said macadamizing of De Camp and Rural Avenues, to be at the sole expense of said street railroad company; and

Whereas, said company in further consideration in part for this grant, expressly agrees to relay all that portion of its Wayne Avenue line lying within the Village of Hartwell, with a construction equal to that of the extension by this ordinance granted; now therefore

Be it ordained by the Village Council of the Village of Hartwell, Hamilton County, Ohio.

SECTION 1. That permission be and the same is hereby granted to the Millcreek Valley Street Railroad Company, its successors and assigns, to extend, construct, maintain and operate the route and tracks of its present electric street railroad system, leading to and

connecting with street railroad lines having a terminus at
41 Fountain Square, in Cincinnati, Ohio, for the convenient dispatch of its business from its present line in Wayne Avenue in the Village of Hartwell, over its extensions and connections south of Fountain Square in the City of Cincinnati, and north over its proposed extensions to the City of Hamilton, in Butler County, Ohio, upon, over and along the following route, to-wit:

"Commencing in the highway known as Wayne Avenue at or near the intersection of Wayne and Rural Avenues, thence westwardly from said intersection of said Avenues over and upon Rural Avenue to the northeast corner of lot No. ninety-five (95) of Hartwell, by the Hamilton County House Building Association, as recorded in Plat Book 3, at page 77, of the plat records of said county; thence over and along that portion of a fifty (50) foot strip of land or avenue, lying south of the center line of the avenue shown on said Hamilton County House Building Association's plat of Hartwell, as lying between the south line of lot No. 89, and the north line of lot No. 95, of said Hamilton County House Building Association's Hartwell, thence over and upon De Camp Avenue to the west corporation line of said village."

Said extension to be a single track street railroad for the carriage of passengers and their packages or their parcels and the mails, the motive power of which shall be electricity or other motive power than steam or horse through said village, with the grant of the right to construct and operate all appurtenances incident and necessary to the proper operation of said street railroad system, and its extensions and connections.

SEC. 2. The entire work in the construction of said road, including the charge of the village Engineer for supervising the work, shall be done at the sole expense of said railroad company under the

direction, and to the satisfaction of the village Council and
42 the village Engineer. Said track or tracks are to be constructed upon the grades and levels established, or upon grades and levels that may be established by Council prior to the building of said street railroad. Wherever the avenues on either side, or on both sides of the tracks of said extension are below the grade heretofore established for same by the Village Council, the

same shall be raised with good coarse gravel to within four (4) inches of the established grade for that portion of said avenues; upon this shall be placed a four (4) inch layer of broken stone, cracked so as not to exceed two inches in diameter, and properly rolled by ten-ton steam roller, all of which shall be covered by a top dressing of fine stone which shall receive one rolling by a ten-ton steam roller.

The sub-grade of that portion of said avenues covered by the tracks of said extension shall be made under the direction and to the satisfaction of the village Engineer. Upon said sub-grade shall be placed at least six (6) inches of good coarse gravel, tamped under the ties according to first class steam railroad practice. Said ties shall be covered with broken stone properly rolled by a ten-ton steam roller, and afterwards finished with a top dressing of at least one (1) inch of fine broken stone, which shall be rolled with a ten-ton steam roller, until the finished construction of the space between the rails in flush with said rails.

Said company shall at all times keep the avenues between the tracks of said extension and a space of eighteen (18) inches on either side of same in good repair, and so as not to interfere with vehicle travel on or across said avenues, and to the satisfaction of the village Council. Should Council at any time during the continuance of this grant, or its renewal, change the grades of said streets the said company shall raise or lower its tracks to conform the same to the new grades, entirely at its own expense within the
43 period of ten days after the change in the grade of said streets shall have been made. Wherever the pavement or street surface is disturbed by the construction, repair or maintenance of the tracks herein authorized, the same shall be restored to like conditions as before disturbed, by the company, at its own expense, keeping dirt and macadam separate, and filling in the dirt first, and the macadam last, the same to be done to the satisfaction of Council and the village Engineer. The said company shall pay the charge of the village Engineer for giving grades and the charge of the village Solicitor for proving the consents.

SEC. 3. Said company shall so construct its street railroad as not to interfere with the drainage, or water pipes or gas pipes, culverts or gutters in said streets, and if, in the construction of said street railroad, the drainage or water pipes, or gas pipes culverts or gutters are interfered with, said company shall remove such obstruction to drainage, culverts or water pipes or gas pipes within ten days, otherwise the same shall be removed by the village at the expense of the company.

SEC. 4. Said road shall be operated by said company as required by the laws of the State, and the ordinances of the village now in force, and at all times so as to create as little hindrance as possible to the public use of said streets as is consistent with the reasonable use of the privilege hereby granted to said company. In constructing said road said company shall open or block off only so much of said street at one time as may be designated by council.

SEC. 5. The rails to be used in the construction of said street rail-

way shall be of the pattern known as a 70-pound Shanghia tee rail. Any rail may be substituted therefor if first approved by the company and by the Council. The ties shall be of sound white oak of at least 5 x 7 x 8 inches. Said company shall use neatly painted wooden or iron poles, placed twenty-four inches inside the curb line, and in line about 100 feet apart, and in such manner as not to interfere with drains, culverts or damage shade trees; the construction to be either span or bracket, and the wires to be supported by neat galvanized cables; under the supervision and to the satisfaction of the village Engineer.

SEC. 6. During its occupancy of said avenues said company shall repair and maintain to the extent of one hundred and twenty (\$120.00) dollars per annum such portions of said Rural and De Camp Avenues as lies without tracks, and a space of eighteen inches on each side thereof, this provision being in addition to the obligation of said company to maintain all that part of said Rural and De Camp Avenues lying between its tracks and a space of eighteen inches on either side thereof. Said sum of one hundred and twenty (\$120) dollars to be paid in addition to the money paid under section 5 of ordinance No. 611, passed September 16th, 1896.

SEC. 7. Tickets between the north line of Hartwell and Fountain Square shall be sold by conductors on the cars of the Millcreek Valley Street Railroad Company, twelve for one dollar for adults, said tickets to be transferable in books and good when so presented. Cash fare between said points to be ten cents for adults, and for children under twelve years of age half price.

Between said north line of the village of Hartwell and the Zoological Garden, Cincinnati, cash fares shall be five cents for adults, and three cents for children under twelve years of age, or two for five cents.

Tickets issued under the provisions of this section shall be good for passage on the cars of the company between any point in the village of Lockland and Wyoming and Fountain Square, and shall carry the right of one transfer to the cars of the Cincinnati Street Railway Company going in the same direction, at any point south of the Zoological Garden, and also transfer at Gas Hall or other junction with Wayne Avenue north of Gas Hall to Lockland or south to Fountain Square; If at any time the company shall grant to the village of Carthage lower rates of fare than is provided for in this ordinance, then the same rates of fare shall also be granted to the village of Hartwell. If at any time during the continuance of this grant or its renewal the Millcreek Valley Street Railroad Company shall obtain the right to operate its cars to Fountain Square, Cincinnati, upon more favorable terms than it now enjoys, a proportionate reduction in the above fares shall be made forthwith.

Cash fares between the south corporation line of Hartwell, and the north corporation line of Glendale shall not exceed five cents for adults, and three cents for children under twelve years of age, or two for five cents, between the south corporation line of the village of Hartwell, and the terminus of said line to the City of Ham-

ilton, the fare shall not exceed thirty-five cents one way, or sixty cents for a round trip ticket, provided also that in case of a reduction of fares between Hamilton and Fountain Square, Cincinnati, a proportionate reduction shall be allowed between Hartwell and Hamilton.

In case said village shall at any time pave said street or avenue on which said railroad is constructed, with asphaltum, brick, granite block, crushed granite or any other kind of paving, said railroad company hereby concedes the right to said village to pave all that portion of the street which is contained between its tracks, and a space eighteen inches outside the outer rails of such tracks with a similar material and at the expense of said railroad company, to be paid for in the same way and on the same terms as the property holders of the village are required to pay; provided such improvement is not made within ten years from the acceptance hereof.

SEC. 8. Said company shall construct at or near its Wayne and Rural Avenue junction in Hartwell, a suitable waiting station for the shelter and accommodation of its patrons, and Council hereby grants said company the right to construct a loop from its tracks in Wayne Avenue or Rural Avenue to private property adjacent thereto, lying at or near the junction of Wayne and Rural Avenues.

SEC. 9. Said company shall run sufficient cars over said extension to accommodate travel to and from Fountain Square in Cincinnati. The first through car shall leave the westerly terminus of said extension on or before 6:05 a. m., and one every thirty minutes thereafter until 9:05 a. m.; from 9:05 a. m. until 4:05 p. m., a through car every hour; between the hours of 4:05 p. m. and 7:05 p. m., a car every thirty minutes; between the hours of 7:05 p. m. and 11:05 p. m., a car every hour; and said company shall run cars from Fountain Square in Cincinnati, to the westerly terminus of said extension at like intervals. In addition to said through service, said company shall give a local car service alternating with through service; if through cars leave every hour and half hour, local cars will leave on the quarter and three quarter hour; the last through car not to leave Fountain Square earlier than 11:30 p. m., and shall be run through to north line of Wyoming. The Council of the Village of Hartwell reserves the right to require said company to operate additional cars, at shorter intervals, whenever public convenience demands the same. Any temporary failure to perform its duties under this section arising from strikes, or from causes beyond its control, or due to any act, or omission or forfeiture of this company or its predecessor, The Cincinnati Inclined Plane Railway, shall not be held to forfeit the rights herein granted, provided said temporary failure be remedied within six months. And provided further that in such case the Council of said Village of Hartwell or its successor shall by resolution extend the time within which company may resume operations as herein set forth.

SEC. 10. Said company shall stop its cars on signal when traveling in a southerly direction at the south line of all abutting or

intersecting streets; and at the north line of all intersecting or abutting streets when traveling in a northerly direction, and at such points as may hereafter be designated by Council.

SEC. 11. Said company shall provide closed cars for winter use, and to be heated by the most approved heater. Suitable summer cars shall be provided for summer use.

SEC. 12. Within five days after the passage of this ordinance, said company shall file with the Clerk of the Village its written acceptance of the terms herein contained, and before commencing construction shall file with the Clerk a bond in the sum of \$5,000.00, in favor of the Village of Hartwell, to be approved by Council, conditioned that it will faithfully perform all the terms and conditions herein set forth relating to the construction, maintenance and operation of said street railroad. Provided, however, that nothing in the grant herein contained shall be deemed, held, construed, or in any way taken to be an enlargement, ratification, renewal or re-enactment of the grant heretofore made to the Cincinnati Inclined Plane Railway Co. by the village of Hartwell by ordinance No. 611, passed September 16th, 1896, but that the grant herein contained shall be subject to all the equities arising out of said ordinance No.

611. And provided further that all liabilities imposed on
48 said company for the benefit of the village of Hartwell shall be binding upon said company in favor of the successor of said Village of Hartwell.

Within sixty days after filing said acceptance and bond the actual work of laying said track, erecting poles and stringing trolley wires shall begin; and unless said company shall construct and operate said street railroad as herein provided on or before September 7th, 1900, unless prevented therefrom by strikes, or legal proceedings, or other causes not within its control, the grant hereinbefore mentioned shall cease and determine, and become null and void; but Council may in its discretion, for good cause shown, extend this period.

SEC. 13. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed May 14th, 1900.

49 *Memorandum of Judge Sater Granting Restraining Order.*

Filed May 23, 1914.

SATER, *District Judge:*

The examination thus far made of this case makes it clear that this court has acquired jurisdiction of both the parties and the subject matter. The time has been and will be too limited, considering the Court's other duties, to permit of an extended examination of the law and facts. In *Blount v. Societe Anonyme du Filtre etc.*, 53 Fed. Rep., 98, 101, Judge Jackson, speaking for the Court of Appeals of this Circuit, quoted with approval *Great Western R. Co. v. Birmingham & O. J. Ry. Co.*, 2 Phil. Ch. 602, as follows:

"It is certain that the court will in many cases interfere and preserve property in statu quo during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. It is true that the court will not so interfere if it thinks that there is no real question between the parties; but, seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff."

He also approved *Glascott v. Lang*, 3 *Mylne & Co.*, 455, as follows:

"In looking through the pleadings and evidence for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiffs to relief at all events. It is quite sufficient if the court finds, upon the pleadings and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

The situation presented is such as to satisfy me that the status quo should for the time being be preserved. Both parties have expressed a desire for an early hearing on the merits. Considering the importance of the interests involved, the embarrassing situations and probable litigation that would follow from an enforcement of the ordinance pending a determination of the matters now in the hands of the court, the conclusion reached is that a restraining order should issue at this time and continue until the case can receive the thoughtful consideration which it merits, and that the case be assigned for final hearing at an early date, which is fixed for June 6, 1914, at 9:30 o'clock A. M. The defendant is entitled to an early hearing. If it feels that a bond should be given, it will be heard by making that fact known.

51

Restraining Order.

Issued May 23, 1914.

Whereas, in the above cause, a motion for the issuance of a restraining or preliminary injunction has been duly filed and heard and the time for adequate consideration of the law and facts has been and will be insufficient prior to the date the ordinance in question will become operative, and it appearing to the court that pending the determination of such motion and the rights of the parties insofar as they can be and should be determined on a hearing of the character above mentioned, there is danger of numerous suits and of confusion and controversy arising as regards the operation of cars and the payment of fares over and upon the lines or tracks in question, and that there is in the case a real and substantial question to be investigated and decided, and that the parties hereto, as declared by each of them in open court, desire a speedy final hearing on the matters involved, and that such hearing will greatly

aid in determining the rights of the parties, and that the status quo should be preserved until the case can be disposed of on the consideration which it merits:

It is hereby ordered that the defendant, its officers, agents and employees, be restricted from interfering or attempting in any way to interfere with the maintenance and operation or either, by the plaintiffs, or either of them, of the line of electric street railway or any part thereof here in controversy, and mentioned in the pleadings and ordinance in question, and from enforcing or attempting or taking any steps to enforce the said ordinance or any part thereof, and from taking any action regarding the same, until this cause is finally heard on its merits on June 6, 1914, at 9:30 A. M., and until a decision is rendered on the hearing then had.

J. E. SATER, *Judge.*

53 *Return of Marshal of Certified Copy of Restraining Order.*

Filed May 25, 1914.

Received a Certified Copy of Restraining Order in the above entitled Cause, on the 23rd day of May 1914, and on the same day I served The City of Cincinnati, Ohio, by delivering said Certified Copy of Restraining Order by handing same to Walter M. Schoenle, City Solicitor, personally at Cincinnati, Ohio.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By W. J. SANDERSON,
Deputy.

Fees:

1 Service,	\$2.00
2 Miles12
Total.....	\$2.12

54

Mem. on Final Hearing.

Filed July 9th, 1914.

SATER, *District Judge:*

The bill charges an impairment and an attempt to impair the obligations of contracts in violation of Article 1, Section 10, of the Constitution of the United States, and that the enforcement of the city ordinance will deprive the plaintiffs of their property without due process of law and without compensation, in violation of the fourteenth amendment to such constitution. This court has jurisdiction of both the litigants and the subject matter. *Owensboro v. Cumberland Telephone Co.*, 230 U. S., 58. In that case diverse

citizenship was absent. The Telephone Company was a Kentucky corporation and the City of Owensboro was a municipal corporation organized under the laws of that state. *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 174 Fed. Rep., 739, 740, 745, C. C. A. 6.

On the issues made and on account of the attitude and claims of the city casting a cloud upon the title of the plaintiffs, injunctive relief may properly be sought. *Blair v. Chicago*, 201 U. S. 400, 449, 450; *Iron Mt. R. Co. v. City of Memphis*, 96 Fed. Rep., 113, C. C. A. 6.

Whenever a franchise is accepted and acted upon by a grantee, such grant becomes a contract between the parties to it under the contract clause of the constitution. The street or highway rights of the grantee become alienable and assignable property. *Owensboro v. Cumberland Telephone Co.*, pp. 65, 72, 73, 74, 75; *Detroit v. Detroit Citizens' Ry. Co.*, 184 U. S. 368, 394; *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 662; *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. Rep., 296, 299; *Booth on Street Railways*, Sec. 10, 1st ed. An accepted grant of a right to enter upon and occupy a street or highway by a street or interurban railway is, in the absence of express restrictions, capable of being sold, conveyed and assigned, and is a right entitled to all the protection afforded other property or contract rights. *Louisville Trust Co. v. City of Cincinnati*, supra, p. 299; *State v. Traction Co.*, 15 Ohio C. C. (N. S.), 577, 584, 585.

A valid grant of the right to occupy a street or highway for the conduct of a street or interurban railway business is a grant of a property right in perpetuity, unless its duration is limited by the grant itself, or by the general law of the state, or by the county commissioners or the corporate powers of the municipality making the grant. *Owensboro v. Cumberland Telephone Co.*, pp. 65, 66; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 395; *Louisville v. Cumberland Telephone Co.*, *State v. Traction Co.*, 15 Ohio C. C. (N. S.) 577, 585, 586. The Supreme Court of the State has made no ruling on the question as to the perpetuity of a franchise. Whether or not, in the absence of a limitation, the right in perpetuity is subject to termination by the General Assembly under Sec. 2, Art. 1, or Secs. 1 and 2 of Art. 13, of the State constitution, as suggested in *State v. Traction Co.*, supra, p. 586, and *State v. Railway Co.*, 1 Ohio C. C. (N. S.), 145, is immaterial as regards the present case, because the General Assembly has not acted in that behalf.

Much has been said about the burden of proof. A franchise that has been accepted and acted upon constitutes a contract. If it is susceptible of two meanings, the construction that is favorable to the municipality or grantor prevails. The rights asserted against the grantor must be clearly defined and not raised by inference or presumption. *City of Detroit v. Detroit United Ry. Co.*, 172 Mich., 136, 153; *Cleveland Elec. R. Co. v. City of Cleveland*, 204, U. S., 139, 140; *Blair v. City of Chicago*, 201 U. S., 400, 471. But where such a contract is clear and free from ambiguity it is construed the same as any other contract, and nothing by

construction can be added to or subtracted from the rights of either party.

There is no merit in the defendant's claim that a grant made by the county commissioners subsequent to April 18, 1883, is by statute and without affirmative action on their part, limited to twenty-five years' duration as specified in section 2502, Rev. Stat. Ohio, as amended March 20, 1884 (81 Ohio L. 65). Section 3439, Rev. Stat. (1880), declared that the provisions of sections 2501 to 2505 inclusive, Rev. Stat., so far as applicable, should be observed. Section 2502 limits the life of a franchise to twenty-five years. On April 18, 1883 (80 Ohio L. 173, 175), section 3439 was so amended as to make only sections 2501, 2503, 2504 and 2505 thus applicable, and original section 3439 was repealed. It will be noted that section 3439 as thus amended excluded all reference to section 2502, and as the amended section 3439 was in force in 1889, a grant made within that year by the county commissioners was not subject to the twenty-five year limitation, unless made so by the terms of the grant. It will be further noted that section 3439 as amended was in force in 1892, when the franchise which was held to be perpetual in *State v. Traction Co.*, 15 Ohio C. C. (N. S.), 577, 585, was granted. In *Citizens Elec. R. Co., v. County Commissioners*, 56 Ohio St., 1, the city of Mansfield by ordinance authorized the company to extend its tracks both within and without the city limits over a state road. No leave having been obtained from the county commissioners to occupy the road and the company having excavated and digged it up, the commissioners sued and recovered damages. It was held that the ordinance of the city adopted under section 3438, Rev. Stat., simply conferred on the company the corporate power to extend its road over a state or county road

and that the right of the company to extend its line must be
57 acquired from the commissioners or by condemnation, they having under the statute the general supervision and control of the state and county roads. It was said that the word "officer" as used in section 3441 embraces boards of county commissioners and that an ordinance of a municipality is necessary to confer the power on a railway company, but the right to use and occupy a road does not come from a municipality, but from the commissioners. The extent of the power of county commissioners over state and county roads is thus stated in *Lewis v. Laylin*, 46 Ohio St., 663, 671, 672:

"That a state or county road is not extinguished by becoming a street of a municipal corporation is clear. It retains its character of a state or county road, even as to such portions of it as may chance to fall within the limits of a municipal corporation, that may be subsequently organized; nor is this character changed, because the municipal authorities call it a street and give to it a name as such, and are invested by law with its general control. Should the municipality cease to exist, the highway would at the same time cease to be a street, but it would not cease to be the state or county road which it was originally.

If so apparent a proposition requires support from authority,

enough will be found in the case of *Bisher v. Richards*, 9 Ohio St. 485, where it was held that the laying out of a state road over a county road did not extinguish the latter, but that both might co-exist. If that is so, upon the same principle a state or county road would continue to exist after its adoption by a municipal corporation as a street.

It has also been held in this state, that under a statute giving the commissioners general power to lay out and establish county roads, they were authorized to lay out and establish a county road within or through an incorporated town or city. *Wells v. McLaughlin*, 17 Ohio St. 99. Also, one 'whose termini are wholly within the limits of an incorporated town or city.' *Butman v. Fowler et al.*, 17 Ohio, 101. These cases establish the doctrine that territory, within a municipal corporation, is not exempt from the operation of general laws giving authority to county commissioners respecting public highways."

Railroad Co. v. Cummins, 53 Ohio St., 683, is authority for the statement that a municipal council has no power to vacate that part of a county road which lies within the municipality. In *State v. Craig*, 22 Ohio C. C., 135, 138, the court found no conflict between the *Lewis* case and the *Defiance* case above mentioned, and sustained the contention that the portion of the county or state road lying within a municipal corporation may be improved by the county commissioners. The record in this case shows that the county commissioners are improving the Springdale pike within municipal limits. The above authorities sufficiently portray the extent of the power of commissioners over county and state roads.

On April 6, 1899, the Zoological Land Syndicate gave "the right to the Cincinnati Inclined Plane Railway Company to construct and extend double tracks, with the necessary appendages and appurtenances of an overland electric street railroad system, through such syndicate's premises from the present northern terminus of such railway to Erkenbrecker Avenue, and thence upon and along such avenue to the Carthage Pike." On February 21, 1890, the syndicate made a plat of its land, which was filed on June 27 following and accepted by the city on May 2. The dedication of Erkenbrecker Avenue occurred at the time of the filing of the plat. The grant was without limitation as to time. Its language implies that it is perpetual. The defendant contends that the grant is not binding on it because (1) it covered a small tract or space not owned by the Syndicate, (2) the instrument granting the right of way to the railway company was not recorded, and (3) the Syndicate's plat of its premises does not show the reservation of a street railway route over what is now Erkenbrecker Avenue. The date of the construction of the road over such premises is not shown by the proofs in this case, but the uncontradicted averments of certain of the pleadings in former cases offered in evidence fix such date as in 1889, since which time the road has been in operation. The space covered by the grant of the Syndicate for which it held no title extends northerly a distance of 241 feet from Vine Street to the boundary of the Syndicate's land, as

shown on the plat marked Exhibit "A". Whether the plaintiffs' right to operate over such space and whether the grant by the Syndicate and the franchise given over the Carthage Pike by the county commissioners on March 23, 1889, were valid and are still subsisting involves an examination of certain litigation hereafter to be noted, and the three above mentioned matters may therefore be conveniently considered together.

In 1895 the Louisville Trust Company as trustee under a mortgage of the Railway Company (76 Fed. Rep. 296, 299), sued the city, setting up the Syndicate's grant and its ownership of the premises through which the right of way extended and claiming a franchise and right to operate the road to the Zoological Garden and over both the right of way granted by the Syndicate and the Carthage turnpike to the County fair grounds in Carthage, and charging that the city, through its officers and agents, was asserting that the railway company had no right to hold, maintain and operate a railway and was unlawfully maintaining poles, wires and other appliances for operating the same with electricity, and was threatening to remove the same and grant the right and franchise to operate a street railway to a competing and rival line and thus take away the property, rights and franchise of the Inclined Plane Railway Company. In the fifteenth paragraph of the bill it was alleged that the franchise constituted existing contract rights and that the city's proposed action would impair and annul them. The bill recited the injurious character of such conduct and prayed an injunction. Goodman, who was also a trustee under a mortgage of the rail-

60 way company, intervened and made similar averments. The city answered, denying the averments of paragraph 15 of the bill of the Trust Company and averred that it had the right to prevent the railway company from maintaining and operating tracks on Vine Street to the corporation line of the city and of Avondale, because the railway company never lawfully acquired, for reasons stated in the answer, the right so to do. Later, the Louisville Trust Company filed a foreclosure bill and the two cases were then consolidated. A decree was rendered after the case was remanded to the Circuit Court, finding among other things that one of such trustees had a lien on the railway company's property and line of railway to the entrance of the Zoological Garden at Erkenbrecker Avenue, and that the other trustee had a lien on all of the railway company's property and road beginning at the entrance to the Zoological Garden at Erkenbrecker Avenue and extending over the Carthage Pike to and through Carthage and thence on Lock Street in Lockland, as well as on that part of its road south of such Garden, and directed a sale of the premises by a special master. The property was bought by Kilgour at the sale had under the decree, who received a deed therefor dated May 20, 1898. The city abided by that decree. Kilgour leased to the Mill Creek Valley Street Railroad Company on October 10, 1898, all that portion of the property so purchased by him between the entrance to the Zoological Garden in Cincinnati and the northernmost point in the Carthage Pike, which is intersected by the corpora-

tion line of Cincinnati. On the day following he conveyed by deed to such company all of the property so purchased by him between such point and Lock Street in the village of Lockland.

On August 4, 1898, the Mill Creek Valley Street Railroad Company, formerly the Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, brought an action in the Court
61 of Common Pleas of Hamilton County, Ohio, against the village of Carthage, its marshal and the members of its council, averring that it owned and operated a line commencing at the entrance of the Zoological Garden and Erkenbrecker Avenue and extending thence along said Avenue over the Carthage Pike through Carthage and Hartwell and into Lockland, and that it had constructed, equipped and was operating such road. The grant to the Inclined Plane Railway Company by the Zoological Land Syndicate in Erkenbrecker Avenue was averred to have been "made by the owners of the property now embraced within the limits of said Avenue prior to its dedication to the public and said Avenue was dedicated and accepted subject to the grant so made." It was alleged that on March 23, 1899, the board of county Commissioners, at the instance of the village of Carthage, granted a franchise on Carthage Pike to the Inclined Plane Railway Company; that, on August 7, 1894, the village executed a grant or franchise beginning at the northern terminus of the grant theretofore made by the county commissioners and extending on to the north corporate limits of such village, which grant was also accepted and in pursuance thereof a railway was built and has ever since been operated; that the village council of Carthage had adopted a resolution requiring the removal of the plaintiff's tracks in such village, the trouble between the contestants being over rates of fare; and that the village had also caused the prosecuting attorney of the county, in the name of the state, to institute quo warranto proceedings in the State Circuit Court, to require the plaintiff to declare its franchises void. The prayer was for an injunction. The defendants admitted that the street railway company had equipped and was operating its road over all the public ways mentioned in the petition. It also admitted the passage of the ordinance of August 7, 1894, and its acceptance by the grantee, the building of the road and the village's attempt to
62 repeal the ordinance, the commencement of the quo warranto proceedings by the prosecuting attorney, the passage of an ordinance repealing that of August 7, 1894, and the adoption of a resolution requiring the removal of the Railway Company's tracks, but denied everything else. It denied that the village had any right to pass the ordinance of August 7, 1894 or the Inclined Plane Railway Company authority to accept it. An amendment to the petition sets up the proceedings heretofore mentioned in the United States Court, and the lease and deed theretofore given by Kilgour, and in its reply averred that on May 17, 1892, the village of Carthage by resolution requested the Inclined Plane Railway Company to double track from the entrance to the Zoological Garden to the northern terminus of the Carthage Pike, and that it did so at its own cost and expense. On a hearing the court

found the issues in favor of the plaintiff and on appeal the Circuit Court perpetually enjoined the defendants from interfering in any way or in any manner molesting the plaintiff in the quiet and peaceable enjoyment of its railroad property, from obstructing it in maintaining its tracks or other railway appliances and from interfering with the plaintiff's use and operation of its railway in said village, and dismissed the cross-petition of such village. 18 Ohio C. C. 216, aff'd 62 Ohio St. 636.

On February 2, 1901, an action in quo warranto was begun in the Hamilton County Circuit Court in the name of the State of Ohio on the relation of Harry M. Hoffheimer, Prosecuting Attorney of Hamilton County, Ohio, against the Mill-Creek Valley Street Railway Company and the Cincinnati Street Railway Company, successors to the rights of the Cincinnati Inclined Plane Railway Company, to oust and exclude them from the franchises which they then enjoyed and under which they were operating, which franchises, began, it is charged, in the center of the city of Cincinnati

63 at Fifth and Main streets, ran thence to the Zoological Garden in Erkenbrecker Avenue, thence along such avenue to the Carthage Pike, thence to the north corporation line of the village of Carthage. The grant of the franchises by the city and the extension of the railway tracks to the Zoological Garden by the way of Vine street is alleged, and also that "under authority conferred by the Zoological Land Syndicate under date of April 6, 1889, and by resolution passed by the commissioners of Hamilton County on the 23rd day of March, 1889, and by resolutions passed by the village of Carthage on the 19th day of March, 1889, The Inclined Plane Railway Company extended its tracks from the point at or near the entrance to the Zoological Garden over Erkenbrecker Avenue to the Carthage Pike, and thence over such pike to the northern terminus of such railway in the village of Carthage and operated its lines so extended as a street railway," and that subsequently on August 7, 1894, by authority of an ordinance passed by such village, the railway company further extended its tracks to the north corporate line of Carthage and operated thereafter its lines to that point. It charges a traffic arrangement between the two defendants whereby passengers were carried from Fifth and Main streets and from Fountain Square to the extreme northern limits of the lines heretofore mentioned and to the extreme north corporation line of Carthage. On account of certain alleged wrongs in the matter of charging and collecting fares, it was averred that the defendants were usurping and unlawfully and wrongfully held their franchises and ought to be ousted. Subsequently the plaintiff by amendment charged that the Mill Creek Company illegally and without authority of law was usurping and exercising its franchise to so much of the railway line as lies north

64 of the entrance to the Zoological Garden and was unlawfully and "without authority of law usurping the franchise of running street railroad cars over the portion of the line aforesaid of railroad described in the petition and of collecting fares from passengers traveling over the same to or from the part

south of the entrance to the Zoological Garden," and asked that it be ousted and excluded therefrom. The Cincinnati Street Railway Company answered, setting up among other things the litigation heretofore mentioned in the United States Court, the sale to Kilgour, his disposition of the property purchased by him, and the traffic arrangement between itself and its co-defendant under which passengers were carried without change of cars from the center of the city northward to Carthage. The Mill Creek Street Railroad Company pleaded in its answer that "on or about the 6th day of April, 1889, an association known as the Zoological Land Syndicate was the owner and in possession of certain land lying between the entrance to the Zoological Garden and the Carthage Pike; that on said date said Syndicate granted to the Cincinnati Inclined Plane Railway Company the right to construct and maintain and operate a double surface railroad track with the necessary appendages and appurtenances for an overhead electric railroad system over said land from the entrance to said Garden to said turnpike; and that the strip of land within which the said line of railway was located was afterwards dedicated and accepted subject to said railway grant as a street known as the westerly portion of Erkenbrecker Avenue. Defendant further avers that at the dates hereinafter mentioned and for many years prior thereto the Carthage pike extended from a point south of said Erkenbrecker Avenue northwardly to a point in a northerly direction in the incorporated village of Carthage; that on said date said turnpike was in the possession and under the control of the Commissioners of Hamilton County, as a toll

65 road; that on or about the 23rd day of March, 1899, said Commissioners by a resolution duly passed granted to the said Cincinnati Inclined Plane Railway Company the right and privilege to use and occupy with double surface tracks with the necessary appendages and appurtenances of an overhead electric railway system, the said Carthage Pike from a point near Ludlow Avenue (being south of said Erkenbrecker Avenue) northwardly, by double surface tracks, to the north terminus of said turnpike in said village of Carthage." It also set up that the purpose of certain conditions named in such grant of August 7, 1894, some of which related to fares, was the continuous passage without change of cars, from such village to Fifth and Walnut streets in Cincinnati. The proceedings and the action had thereunder in the Federal Courts and the lease and deed of Kilgour were also averred. It also charged that the Village of Carthage had attempted to repudiate all of its legislation and prevent the operation of such company's line, notwithstanding its giving lower rates of transportation than required by its grant, that in consequence the defendant had brought the action in the Court of Common Pleas heretofore mentioned to enjoin the village from interference with its operation of the road and exercising all its franchises, from which an appeal was prosecuted to the Circuit Court, in which the village was perpetually enjoined as heretofore mentioned; and that the commissioners having prosecuted an appeal to the Supreme Court of the State from the decree of the Circuit Court, such last named court was there affirmed.

The plaintiff filed a reply as well as amendments thereto, in which it admitted that the Zoological Land Syndicate owned on April 6, 1889, the lands lying between the entrance to the Zoological Garden and Carthage Pike; that such pike extended to the northerly part of the village of Carthage; that such village passed the ordinance of August 7, 1894; and averred that at the time of the passage of the various resolutions and the enactment of the various

66 proceedings set forth in the amendment to the answer of the Mill Creek Valley Street Railway Company, the east half of a portion of the Carthage turnpike was in the village of Avondale and the west half in the village of Clifton, which two villages remained such until they were annexed to the city of Cincinnati on January 1, 1895, and that since that time the portion of the turnpike within such villages has been a part of the city of Cincinnati. It also alleged that the northern boundary line of the city of Cincinnati where it crosses Vine street was co-terminus with the north end of the line of railway constructed upon such street, which line was the southern boundary line of the property of the Zoological Land Syndicate, and that when the grant was made by such Syndicate to the Inclined Plane Railway Company the syndicate's land was within the city of Cincinnati. There is a further recital as to the villages lying north of the Zoological Garden along the line of the Carthage pike. It charged that the grant made by the county commissioners on March 23, 1899, and by the village of Carthage on August 7, 1894, were extensions and not independent grants, and were obtained on the representation that they were merely extensions. As regards the litigation in the Federal Courts it is said that no claim was made nor was any question presented before that court as to the validity or invalidity or the legal effect of the various grants and rights called in question in such quo warranto case, or as to the right to maintain and operate a line of railway beyond the north corporate limits of the city of Cincinnati from the entrance to the Zoological Garden. The cause was heard upon the pleadings and evidence and each and all of the issues were found in favor of the defendants, the decree specifically reciting:

67 "The Court further finds that the grant to the Cincinnati Inclined Plane Railway Company made by the Board of County Commissioners of Hamilton County on the 23rd day of March, A. D. 1889 * * * was not a grant of an extension of the line of railway then and theretofore operated by the Cincinnati Inclined Plane Railway Company on Vine Street in the city of Cincinnati, but that the same was a distinct and independent grant, upon the terms therein set forth, to the Cincinnati Inclined Plane Railway Company, of the right to construct, maintain and operate a street railroad in the Carthage turnpike, that said grant was duly accepted by the grantee therein named and that the defendant, the Mill Creek Valley Street Railroad Company, has become the owner of the street railroad therein provided for and of the right and franchise to maintain and operate the said street railroad as in said resolution provided."

The petition was dismissed at the plaintiff's costs. Error was

*Ed from
brief*

prosecuted to the Supreme Court of the state. The issues presented and argued in that court were stated by the relator's counsel in their printed brief as follows: "The amendment to the petition challenges the right of the Mill Creek Company to operate the road north of the entrance to the Zoological Garden. The response to that challenge is the production of the grants made by the Zoological Land Syndicate, the County Commissioners, the village of St. Bernard and the village of Carthage, to the Inclined Plane Company in 1889; * * * the further grant to the same by the village of Carthage in 1894 for an extension of the line to the north line of that village; * * * and the acquisition of that company's rights. * * * The primary question is as to the validity and effect of the grants of 1899." The decree of the Circuit Court was affirmed without report. 74 Ohio St., 453.

The statute required the plat of the Zoological Land Syndicate to be submitted to the city's board of commissioners for approval before it was filed. When recorded it operated as a conveyance in fee of all the streets shown on it. Sections 2601, 2626, 2639, Rev.

Stat. 1880. The city's attitude as regards the grant from
68 the Syndicate was more than one of inaction and silence. It

at no time claimed that such right did not embrace the 241 feet which it now appears the syndicate did not own. The grantee mortgaged its entire right of way including all that the syndicate purported to convey, and the city as a party to the litigation in the Federal court in silence and without protest stood by when the decree was rendered and the property sold and subsequently leased by Kilgour. The answer of the village of Carthage in the suit by the Mill Creek Valley Street Railway Company is also broad enough to constitute a denial of the syndicate's ownership of the right of way granted by it, but admits the railway company's construction and operation of the road over the whole of such right of way as granted, the basis of the contest in that case being the matter of fares and not that the syndicate's grant covered more than it owned. The village of Carthage subsequently became a part of Cincinnati, the latter thereby being placed in the same position as the village regarding prior litigation with it. The petition in the quo warranto case affirmatively avers that under authority of the right given by the syndicate, the grantee extended its tracks over the identical space now in question and operated its cars over the same. It is true that it denies the right of the railway company to exercise its franchises north of the entrance to the Zoological Garden, but such denial did not specifically allude to the 241 feet now in question, but to the whole of the line of railway north of such entrance. The averment was based on the alleged wrongful charging and collecting of fares and not on a defective grant. In its reply the city specifically admitted that the syndicate at the time it gave the railway company a right of way owned the land lying between the entrance
69 to the Zoological Garden and the Carthage Pike, of which the strip over which it now charges the plaintiff has no franchise was a part. It necessarily knew that those successively claiming under the syndicate's grant had made and were making expen-

ditures in the construction, operation and maintenance of the entire line from the entrance to the Zoological Garden northward, were conducting business over such line and on faith of its ownership thereof were issuing stock. Not until this suit was brought or perhaps until the ordinance under which it is based was passed did the city assert that the syndicate's grant was excessive. The claim comes too late. The doctrine of estoppel applies to municipal as well as to private corporations. When they have power to act or contract, they may estop themselves by their conduct, silence or acquiescence as a natural person may do. There is a broad distinction to be observed between an irregular exercise of a granted power and the total absence or want of power. In the latter case there can be no estoppel. In the instant case the power on the part of the city to grant a franchise over such 241 feet existed and thereby rendered applicable in a proper case the doctrine of estoppel. In *Mill Creek Valley Street Railway Co. v. Village of Carthage*, 18 Ohio C. C. 216, supra, it was affirmatively found that the terms of the ordinance of August 7, 1894, were accepted and complied with, including the cash payments required, and that the railway company entered and built its road (p. 220). The court reviewed briefly the proceedings in the Federal Appellate court (76 Fed. Rep. 296) and in the Circuit Court when the cause was remanded, and the binding character of the decree of foreclosure on the city of Cincinnati and the rights of the purchaser (Kilgour) at the foreclosure sale, and then stated the contention of the village of Carthage, that it was not a party to the suit in the United States Circuit Court and was

70 not therefore bound by the decree and that it had a right by ordinance to enforce the removal of the railway company's tracks (the whole of such tracks within the corporate limits of the village being involved), and then held that the village could not by its own declaration determine the company's road to be a nuisance but that due process of law required a hearing and trial before forfeiture could be adjudged. Then passing to the question of estoppel (pp. 229, 231) it said in part as follows:

"The village of Carthage did more than to stand by and silently see the corporation, the predecessors of the plaintiff in the chain of title, construct a street railroad in and upon its streets. It, by resolution and by solemn acts of its council, urged and encouraged it to do so. How can that same village be heard to say that the action of its council was wrong, unauthorized, and that it had no power to give the privileges or make the grants it attempted to do? We think this is a question the village is not in a position to raise in a court of equity. The village is in the same position of a party who stands by and sees a public enterprise, such as a railroad, constructed in its streets at great expense with other valuable interests attached thereto. It is then too late for it, after the enterprise is consummated and large sums of money have been expended on the strength of their action and active encouragement, to seek by injunction or otherwise to deny the right of the company making the improvements or its successors to use the property. *Goodin v.*

Cincinnati Whitewater Canal Company, et al., 18 Ohio St., 169, 179; Pennsylvania Company v. Platt, et al., 47 Ohio St., 363-381.

In the case of City Railway v. Citizens Railway, 166 United States, Justice Brown, at page 566, says: "all that is necessary to create an estoppel in pais is to show that upon the faith of a certain action upon the part of the city, which it had power to take, the company incurred a new liability, as for example, by the negotiation of a new loan and the issue of new bonds and mortgage to secure the same."

"The doctrine of estoppel in pais applies the same to municipal corporations as to individuals." Citing many authorities.

Other authorities in point are State v. Spokane St. Ry. Co., 19 Wash., 518, 67 Am. St. Rep., 739, 749; 20 Am. & Eng. Ency. Law, 1182; Horstman v. Cincinnati Street Ry. Co., 12 Ohio Dec., 756, 758, et seq. (Cincinnati Superior Ct.); Columbus v. Federal Gas & Fuel Co., 2 N. P., (N. S.), 277, 283; Hackett v. Ottawa, 99 U. S., 86, 96; Bissell v. City of Jeffersonville, 65 U. S. 287, 300; McQuillen,

71 Munic. Corp. Sec. 1083. The far reaching effect of the doctrine of estoppel as applied to the instant case is manifest. It heals the defect, if any, in every grant here involved, and assures the plaintiff's right to operate over the 241 feet concerning which the grant of the Land Syndicate was excessive.

The right given by the Land Syndicate is perpetual to the extent at least of the grant over the premises owned by it. No reason appears why a grant made by an individual or representative to a street railway company may not be, as regards duration, the same as that made by some person to a steam railroad company. Considering the location of the 241 feet in question, the long period during which the plaintiffs and their predecessors in title have occupied and used such space, and the acquiescence and express admissions made by those authorized to make them and in law binding upon the defendant, the situation is such that much force attaches to the contention that the right to use and occupy such space is also perpetual, but whether such right is perpetual or not need not now be determined. The right of the plaintiffs to operate their cars over such 241 feet exists, and in my judgment will continue so long at least as any indebtedness incurred in good faith on the strength to so operate is outstanding—my understanding from counsel being that the plaintiffs have bonded their roads, including the 241 feet in question.

The validity of the franchise granted by the County Commissioners at the instance of the village of Carthage and extending from the Syndicate's land to Gas Hall in such village was established in the above mentioned quo warranto proceeding and is also perpetual. Whether the question is *res adjudicata* or not need not now be determined; for, if, as was held by the Circuit and Supreme

72 Courts, the franchise was valid then, it is valid now. Nothing since has occurred to destroy the right then existing.

Considering the attitude of the city and the village of Carthage in the litigation hereinbefore mentioned, to which they were respectively parties, and the legal consequences resulting therefrom, the grant by such village on August 7, 1894, from Gas Hall to the

north corporation line is also valid, for a period of at least 25 years from its date—the determination of precise extent of its duration not being at this time material.

Without entering into detail, suffice it to say that the grants of franchises under which the plaintiffs are operating from Carthage northward to the north portion of Hartwell, and on Woodbine and De Camp Avenues and northward on the Springfield pike, are valid and subsisting. Grants were in fact made, and considering the long period which has elapsed during which the plaintiffs and their predecessors in title have notoriously operated over the same, having made large expenditures so to do, the doctrine of estoppel, as heretofore indicated, applies, and the defendant may not now complain. Allusion has heretofore been made to the fact that the county commissioners are now under contract for the improvement of the Springfield pike and are still exercising dominion over it. In those instances in which the plaintiffs and their *re*-predecessors in title were required to make payment for the use of the streets, payment has regularly been made and received by the proper municipality. The control of the county commissioners over the Carthage turnpike is evidenced by the act of April 25, 1893, local laws of Ohio, 243-245. There is also recognition by the state in such act of the presence of a street railway on that pike. There is a presumption that when the several grants were made the requisite consents

73 of property owners were obtained and the city may not complain on their behalf. *State v. Railway Co.*, 11 Ohio C. C. (N. S.) 263, affirmed without report 81 Ohio St., 502. Nor may the city complain for the county commissioners or seek to protect their rights as to either the Springfield or the Carthage pike, they not being parties to this action. *State v. The C. H. & El. St. Ry. Co.*, 19 Ohio, C. C., 79, 80.

The cases heretofore reviewed which were conducted in the state and federal courts were in charge of able counsel. The plat of the Land Syndicate was on record in the appropriate office and open to inspection. They did not, however, assert that the right given by the Syndicate was excessive. They did not plead that the city, when it accepted the dedication of Erkenbrecher Avenue, did not have notice of the grant of such right. Such a plea would have been unavailing even then, had it been made. The plea was interposed in the quo warranto case that the road operating over the Carthage pike under the grant of March 23, 1889, passed through certain villages from which it has never been claimed any grant or assent was obtained. The plea was not effective in any of the state courts, and cannot in the present case prevail as to any of the grants assailed. The defense made as to this or that grant, of failure to obtain the consents of abutting property owners, or to award franchises on competitive bidding, or to procure the assent of the village council, or to comply with some condition named in a resolution or ordinance, even if true and even if possessed of merit when timely pressed, cannot now prevail after so long acquiescence. To heed such a defense and enforce such an ordinance as that recently passed by the city would not only wrongfully impair and to

a considerable extent destroy the property rights of the plaintiffs, but would also operate likewise as to the plaintiffs' stockholders, bondholders (if any), and creditors, generally, who in good faith gave credit to the plaintiffs.

The facts in the Toledo case decided by Judge Killits are unlike those before this court. *Railroad Co. v. North Bend*, 70 Ohio St., 46, is not helpful. No grant from the county commissioners was involved. The powers conferred on hamlets by section 1651, Rev. Stat., are moreover, greater than those conferred on other municipalities, as will appear from decisions of the State Supreme Court touching that section. A discussion of the city ordinance attached to the bill is unnecessary. The rights of the parties on the expiration of any given franchise are stated in *City of Detroit v. Detroit United Ry.*, 172 Mich., 133, 154, et seq., and *Detroit United Railway v. Detroit*, 229 U. S., 39, 46. In so far as the grant of any franchise assumed the form of a resolution instead of an ordinance is considered to be immaterial. *Kerlin v. Toledo*, 20 Ohio C. C., 603.

The power and interest of county commissioners are coextensive with the county. They may maintain and control state and county roads for all who have occasion to travel over them or any part of them. The interest of municipal officers is generally speaking bounded by the limits of the corporation which they represent. There is some haziness in the statutes. There may be apparent rather than real conflict in their application by the courts to individual cases, but the law applicable to the present case is reasonably clear.

None of the franchises in question having expired, the plaintiffs may take a decree for a permanent injunction, such injunction to continue as to each portion of the road in question until the grant therefor shall have expired.

75

Assignment of Errors.

Filed August 4, 1914.

Now comes The City of Cincinnati, the defendant in the above entitled cause, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decision and decree of this Honorable District Court of the United States for the Southern District of Ohio, Western Division, to-wit:

Said United States District Court for the Southern District of Ohio, Western Division, erred:

(1) In holding that it had jurisdiction of the cause of action set out in the bill of complaint and in holding that the ordinance in question repudiated any grants or impaired or attempted to impair the obligations of any contracts, or deprived or attempted to deprive plaintiffs or either of them of their property without due process of law and without compensation, in violation of any provision of the Federal Constitution;

(2) In holding that the bill of complaint set out facts sufficient to constitute a cause of action against the defendant, The City of Cincinnati;

(3) In holding that the bill of complaint set out a cause of action in equity against the Defendant, The City of Cincinnati, and in not holding that the plaintiffs' remedy at law was full, adequate and complete;

(4) In holding that the plaintiffs or either of them owned or had the right perpetual or otherwise to maintain and operate a street railway from Vine Street and the entrance to the Zoological Garden to the Carthage Turnpike and over all parts of such line;

(5) In holding that the plaintiffs or either of them owned or had the right to maintain and operate a street railway over
76 the space of about 240 feet from the old north corporation line of the City of Cincinnati over Vine Street and Erkenbrecher Avenue and also on to the Carthage Turnpike as against the defendant, The City of Cincinnati;

(6) In holding that the City of Cincinnati was estopped from questioning the ownership and the right of the plaintiffs or either of them to operate and maintain said street railway over all or any part of the line from Vine Street *Street* and the Zoological Garden over Vine Street and Erkenbrecher Avenue to the Carthage Turnpike;

(7) In holding that the plaintiffs or either of them owned or had the right perpetual or otherwise to maintain and operate a street railway from Carthage Turnpike and Erkenbrecher Avenue or Ludlow Avenue to the northern terminus of the Carthage Turnpike at or near the County Fair Grounds in the former Village of Carthage, by virtue of the County Commissioners' grant of March 23, 1889, or otherwise.

(8) In holding that the right to maintain and operate the portion of said street railway described in assignment No. 7 was adjudicated or determined in favor of plaintiffs or their predecessors in the case of the State of Ohio ex rel. Hoffheimer vs. The Millcreek Valley Street Railway Company, referred to in paragraph 5 of the bill of complaint, or in the case of The Millcreek Valley Street Railway Company vs. The Village of Carthage; or otherwise.

(9) In not holding that the right to maintain and operate so much of said street railway as lies between the south line of the former Village of Carthage and the north terminus of the Carthage Turnpike at or near the County Fair Grounds in the former
77 Village of Carthage had never been granted by the County Commissioners of Hamilton County, Ohio, to plaintiffs or their predecessors in title, and in not holding that such rights as had been granted by resolution of the Council of the Village of Carthage, March 19th, 1889, had expired;

(10) In holding with reference to the portion of said line mentioned in paragraph 7 hereof that the said County Commissioners' grant was good or effective at the time it was made, or at any time thereafter, and that it is now a good and valid grant, within the

limits of the City of Cincinnati and the former town of Clifton and the former village of Avondale and the former village of Carthage, as they were then bounded;

(11) In not holding that the ordinances of the former Village of Carthage, of August 7th, 1894, and of the former Village of Hartwell, of September 16th, 1896, and of May 14th, 1900, were simply extensions of the street railway tracks or line authorized by the resolution of the former Village of Carthage, passed March 19th, 1889, and that therefore all rights thereunder to maintain and operate said street railway expired at the same time with the rights granted under said resolution, to-wit; March 19th, 1914;

(12) In not holding that each of said ordinances was invalid because of the want of consents of property owners and in other respects, and in the case of said ordinance of the Village of Carthage of 1894, because of the want of publication thereof and advertisement thereunder;

(13) In holding that the City of Cincinnati was estopped to question the right of the plaintiffs to maintain and operate the street railway over that portion of Springfield Turnpike lying within the limits of the former Village of Hartwell between De Camp Avenue and the north corporation line, and in holding that the grants from the County Commissioners and from the Turnpike Company or either of them gave plaintiffs any right to maintain and operate said street railway in said portion of the Springfield Turnpike; and in not holding that plaintiffs had and have no right there to maintain or operate said street railway except by virtue of the ordinance mentioned in assignment No. 19 herein;

(14) In holding that the County Commissioners' grant for any portion of the street railway line in controversy in this case was good, or afforded color of title to plaintiffs or either of them;

(15) In not holding that said County Commissioners had no right to grant any franchise for any part of plaintiff's said line of street railway for a greater length of time than twenty-five (25) years;

(16) In not holding that the twenty-five year limitation in Section 2502, Revised Statutes of Ohio, automatically limited the term of the franchises, if any, granted plaintiffs or their predecessors in title by the County Commissioners of Hamilton County: (a) in territory not incorporated, (b) in incorporated territory, if any right said Commissioners had to make any such grants;

(17) In holding that a right to maintain and operate a street railway within the City of Cincinnati, could be created by an estoppel of the City of Cincinnati or its predecessors in interest, with or without limit in point of time;

(18) In holding that the City of Cincinnati was estopped to question the right of plaintiffs to maintain and operate all or any part of the line of street railway in controversy in this case;

(19) In not holding that the right of the plaintiffs or either of them to maintain or operate a street railway over all or any part of the line in question in this case exists or can arise solely from and in accordance with Ordinance No. 207-1914,

entitled: "An Ordinance No. 207-1914, Specifying the terms and conditions upon which The Cincinnati & Hamilton Traction Company and The Ohio Traction Company, as its lessee, may operate street cars on certain streets of the City, and authorizing the City Solicitor to take legal proceedings to enforce this ordinance," passed by the Council of the City of Cincinnati on April 21, 1914, and duly approved by the Mayor of said City;

(20) The Court erred in allowing the temporary restraining order and the preliminary injunction which was granted herein;

(21) The Court erred in not rendering a decree for the defendant, The City of Cincinnati, and against the plaintiffs;

(22) The Court erred in not dismissing the bill of complaint;

(23) The Court erred in not holding that this suit was premature, the same having been brought before the ordinance complained of became effective;

(24) The Court erred in other respects apparent from the inspection of the record.

Wherefore the appellant, The City of Cincinnati, prays that said decision and decree herein be reversed and that said District Court for the Southern District of Ohio be ordered to enter a decree reversing the said decision and decree of the said Court in this cause and dismissing the bill of complaint herein and restoring the City of Cincinnati to all things it may have lost by reason thereof.

THE CITY OF CINCINNATI,

By WALTER M. SCHOENLE,

City Solicitor;

CONSTANT SOUTHWORTH,

Assistant City Solicitor, Counsel for

The City of Cincinnati, Appellant Herein.

80

Decree.

Entered August 4, 1914, by Judge Sater.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, the Court finds:

That the plaintiff, The Cincinnati & Hamilton Traction Company, is the owner, and the plaintiff, The Ohio Traction Company, is the lessee, of a perpetual right to maintain and operate a street railway over Erckenbrecher Avenue from the entrance to the Zoological Garden to the Carthage Turnpike; except as to the east 241 feet of Erckenbrecher Avenue over which plaintiffs have the present right to maintain and operate a street railway;

That the plaintiff, The Cincinnati & Hamilton Traction Company, is the owner, and the plaintiff, The Ohio Traction Company, is the lessee, of the perpetual right to maintain and operate a street railway over the Carthage Pike from Ludlow or Erckenbrecher Avenue to the northern terminus of said Pike, at or near the County Fair Grounds in Carthage, by virtue of the grant from the County Commissioners under date of March 23, 1889;

That the plaintiff, The Cincinnati & Hamilton Traction Company, is the owner, and the plaintiff, The Ohio Traction Company, is the lessee, of the right to maintain and operate, at least until August 7, 1919, a street railway over Main Street and Lockland Avenue in the former village of Carthage, (now a part of the city of Cincinnati) from the northern terminus of the Carthage Pike therein to the north corporation line of said village, by virtue of the ordinance of the Village of Carthage passed August 7, 1894;

81 That the plaintiff, The Cincinnati & Hamilton Traction Company, is the owner, and the plaintiff, The Ohio Traction Company, is the lessee, of the right to maintain and operate a street railway over Wayne, Rural and De Camp Avenues in the former Village of Hartwell, (now a part of the city of Cincinnati), at least until September 16, 1921, by virtue of the ordinances of the Village of Hartwell dated September 16, 1896, and May 14, 1900, respectively;

That the plaintiff, The Cincinnati & Hamilton Traction Company, is the owner, and the plaintiff, The Ohio Traction Company, is the lessee, of the right to operate and maintain a street railway on Springfield Pike from De Camp Avenue to the north corporation line of the city of Cincinnati in the district formerly known as Hartwell, until at least the 14th day of March, 1925, by virtue of the grant from the company owning said pike dated March 19, 1895, and the grant from the Board of County Commissioners of Hamilton County, Ohio, dated March 14, 1900, for a period of twenty-five (25) years.

It is therefore ordered, adjudged and decreed that the ordinance passed by the defendant, The City of Cincinnati, on April 21, 1914, is null and void, and that the defendant, its officers, agents and employees, be, and they are hereby enjoined from enforcing, or taking any steps to enforce, said ordinance or any part thereof; and from interfering or attempting to interfere, in any way, with the maintenance and operation, or either, by the plaintiffs, or either of them, their successors and assigns, of their said line of electric street railway extending from the entrance to the Zoological Garden

82 to the north corporation line of the City of Cincinnati in the district formerly known as Hartwell, or any part thereof, for and during the term of the grants to operate said line of electric street railway as hereinabove found and set forth; to all of which the defendant, by its counsel, excepts.

From the foregoing decree defendant, The City of Cincinnati, feeling aggrieved thereby in open court prays an appeal to the Supreme Court of the United States sitting at Washington, District of Columbia, for the reasons and errors set out and alleged in its assignment of errors heretofore filed herein, which appeal is hereby allowed in open court, all parties being present, upon said City of Cincinnati giving bond in the sum of five hundred (\$500.00) dollars.

And the said The City of Cincinnati now presenting its bond in said sum conditioned according to law and with sufficient surety, the same is hereby approved.

83

Bond on Appeal.

Filed August 4, 1914.

Know all men by these Presents: That we, The City of Cincinnati, Ohio, as principal, and Equitable Surety Company, St. Louis, Mo., as sureties, are held and firmly bound unto The Cincinnati & Hamilton Traction Company, a corporation under the laws of Ohio, and the Ohio Traction Company, a corporation under the laws of Ohio, in the full and just sum of Five Hundred & no/100 Dollars, to be paid to the said The Cincinnati & Hamilton Traction Company and The Ohio Traction Company, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 4th day of August, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a session of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said Court, between said The Cincinnati & Hamilton Traction Company and The Ohio Traction Company, as Plaintiffs, and the City of Cincinnati as Defendant, a Decree was rendered against the said The City of Cincinnati allowing a permanent Injunction against the enforcing of a certain ordinance, etc. and the said The City of Cincinnati having obtained an Appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the Decree in the aforesaid suit, and a citation directed to the said The

84 Cincinnati & Hamilton Traction Company, and The Ohio Traction Company, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, on the third day of September next. Now, the condition of the above obligation is such, That if the said the City of Cincinnati, shall prosecute its Appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CITY OF CINCINNATI, OHIO,

[Seal of Cin'ti.]

By WALTER M. SCHOENLE, *City Solicitor.*

CONSTANT SOUTHWORTH,

Assistant City Solicitor.

EQUITABLE SURETY COMPANY, [SEAL.]

By JNO. R. RYAN, *Attorney in Fact.*

Sealed and delivered in presence of—

RAYMONA C. DIECKMAN.

M. O'HARE.

Approved by—

J. E. SATER,

District Judge.

85

Citation on Appeal.

Issued August 4th, 1914.

Supreme Court of the United States.

UNITED STATES OF AMERICA, ss:

To The Cincinnati & Hamilton Traction Company, a corporation under the laws of Ohio, and The Ohio Traction Company, a corporation under the laws of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, within thirty (30) days from this date, pursuant to an appeal duly allowed by the United States District Court, Southern District of Ohio, Western Division, and filed in the Clerk's office of said Court on this date, wherein The City of Cincinnati, having been defendant in a case brought by the said The Cincinnati & Hamilton Traction Company and the said The Ohio Traction Company, is now appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said The City of Cincinnati, appellant, as in said appeal and assignments of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 4th day of August, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States one hundred and thirty-ninth.

J. E. SATER,
District Judge.

86 Service of this citation on The Cincinnati & Hamilton Traction Company and The Ohio Traction Company is hereby acknowledged and their appearance is hereby entered.

_____,
_____,
*Counsel of Record for The Cincinnati & Hamilton
Traction Company and The Ohio Traction Company.*

Marshal's Return.

Filed August 12th, 1914.

Received this writ at Cincinnati, Ohio, on August 10, 1914, and on the same day I served The Cincinnati & Hamilton Traction Company, a corporation, etc., by delivering a true copy of this writ, with the endorsements thereon, to Alfred J. Becht, Secretary of said Company, by handing same to him personally at Cincinnati, Ohio.

And on August 10, 1914, I served the within named The Ohio Traction Company, a corporation, etc., by delivering a true copy of this writ, with the endorsements thereon, to D. J. Downing, Assistant Secretary of said Company, by handing same to him personally at Cincinnati, Ohio.

No higher representative or chief officer of either of the above named, The Cincinnati & Hamilton Traction Company or The Ohio Traction Company, found in this district upon whom to effect service.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By W. J. SANDERSON,
Deputy.

Fees.

1 copy	\$.30	(1 copy furnished)
2 services	4.00	
1 mi.06	
	<hr/>	
	\$4.36	

87 *Entry Ordering Evidence Reproduced in Full.*

Entered August 4, 1914, by Judge Sater.

At the desire of the parties hereto the Court directs that all of the testimony and proceedings at the final hearing herein be reproduced in the words of the witnesses and counsel and not in narrative form; and counsel for plaintiffs waiving other notice and consenting hereto it is ordered that the transcript of the evidence and the exhibits tendered by counsel for defendants be approved and the same is hereby ordered filed herein.

88 *Transcript of Evidence.*

Filed August 4, 1914.

Equity No. 35.

Appearances:

For Complainant: Messrs. Lawrence Maxwell, Ellis G. Kinkad, George Warrington, Alfred C. Cassatt.

For Respondent: Messrs. Walter M. Schoenle, Constant Southworth.

Hearing before Honorable John E. Sater, District Judge, at Cincinnati, Saturday, June 6, 1914.

The Court: You may proceed with the evidence, gentlemen. I presume that you are to supplement what is already in evidence so

that you will have a complete record. I assume that all of the ordinances and grants are either attached to the pleadings, or otherwise in evidence now, are they not?

Mr. CASSATT: No, sir; I think not. I think it will be best to put it all in compact form; there is a disposition on both sides to avoid any unnecessary expenditure of time.

The COURT: I hope that counsel will condense it and get it all grouped so that I may handle it with the least possible trouble.

Mr. CASSATT: Yes, we will do that, Your Honor.

The COURT: Then proceed with the case.

Counsel for the complainant offered in evidence a document entitled, "Articles of Incorporation of The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company," dated December, 20, 1894, which said paper is hereto attached made part thereof, marked "Complainant's Exhibit No. 1."

Mr. Cassatt, of counsel for complainant, also offered — evidence a document entitled, "Articles of Incorporation of The Hamilton, Glendale and Cincinnati Traction Company," dated January, 19, 1901, which said paper is hereto attached, made part hereof, marked "Complainant's Exhibit No. 2."

Mr. Cassatt, of counsel for the complainant, also offered in evidence a document entitled, "Joint Agreement of Consolidation, Millcreek Valley Street Railroad Company and Hamilton, Glendale & Cincinnati Traction Company," dated August, 27, 1902 which said paper is hereto attached made part thereof, marked "Complainant's Exhibit No. 3".

Counsel for the complainant also offered in evidence a copy of the printed lease of The Cincinnati and Hamilton Traction Company to The Cincinnati Interurban Company, dated September 30, 1902, which said pamphlet is hereto attached, made part hereof, marked "Complainant's Exhibit No. 4."

Mr. Cassatt, of counsel for complainant, also offered in evidence a document entitled, "Articles of Incorporation of The Ohio Traction Company," dated May 22, 1905 which said paper is hereto attached, made part hereof, marked "Complainant's Exhibit No. 5."

Mr. Cassatt, of counsel for the complainant, also offered in evidence a document entitled, "Assignment of Lease from The Cincinnati Interurban Company to The Ohio Traction Company," dated July 5, 1905, recorded in Lease Book No. 132 page 20, which said paper is hereto attached, made part hereof, marked "Complainant's Exhibit No. 6."

Mr. CASSATT: I will now offer in evidence the record of the case of The Village of Carthage, et al. v. The Mill Creek Valley Street Railroad Company, in the Circuit Court of Hamilton County, Ohio. The form in which this offer is made is the printed record which was filed in the Supreme Court of Ohio, and with that record we offer the pleadings and exhibits, but not the oral testimony. We offer the pleadings, the exhibits and the judgment, but not the oral testimony.

90 The said document is hereto attached, made part hereof, marked "Complainant's Exhibit No. 7."

Mr. SCHOENLE: I suggest that that record be taken subject to our objection as to its relevancy and competency.

The COURT: Very well, I presume the object is to show an estoppel?

Mr. SCHOENLE: This is not the record of the quo warranto proceeding, but the record in another case, in the 18" Circuit Court case.

Mr. CASSATT: Yes, I will now offer the record of the Circuit Court of Hamilton County, Ohio, ex rel. Hoffheimer, Prosecuting Attorney, v. The Millcreek Valley Street Railroad Company. The form in which I offer it is the printed record as it appears in the Supreme Court of Ohio. What I offer, of course, are the pleadings, the exhibits and the judgment in that case.

The said record is hereto attached, made part hereof marked "Complainant's Exhibit No. 8."

Mr. SCHOENLE: We request that that go in subject to the same objection as to relevancy and competency. We are not objecting on the ground of the form in which it is offered.

Mr. CASSATT: I desire also to offer the portions of the record in the case of the Louisville Trust Company v. The City of Cincinnati, and The Louisville Trust Company v. The Cincinnati Incline Plane Company, in the Circuit Court of the United States for the Southern District of Ohio, which is to be found in the printed record just offered, Exhibit No. 8, the numbers being No. 4797 and 4859.

The COURT: Was that the case that finally came up and went to the Circuit Court of Appeals?

Mr. CASSATT: Yes, and then went back again and then a final decree was entered after it went back.

The COURT: Now, you are offering that to show the issues
91 and the court's order?

Mr. CASSATT: Yes, and to show who the parties were.

The COURT: Not the evidence?

Mr. CASSATT: Not the evidence, no, sir.

The COURT: Then I suppose that is taken in the same manner as the other?

Mr. SCHOENLE: Yes; subject to its relevancy and competency.

Mr. CASSATT: That is entirely agreeable.

The COURT: Very well. That is understood then.

Mr. CASSATT: That will appear on page 122 of Exhibit No. 8, and following pages. Now, in the quo warranto case, the record of which I have just been referring to, the ordinances resolutions, correspondence, documents and deeds which make the title of the companies up to the northern boundary of Hartwell are set forth in the form of exhibits. I desire to offer as evidence in this case all of those and if you gentlemen want certified copies of course we will put them in. Those are all found in the record of that same case, Exhibit No. 8. I suppose you will want the same understanding as to that—subject to relevancy and competency?

Mr. SOUTHWORTH: So as not to mislead the court or counsel, we object particularly to one of those papers, the consent of the Zoo

Land Syndicate, on the ground that it never was recorded and is no notice to us on account of the dedication of the street later to us.

Mr. CASSATT: We will stipulate that as a matter of fact it was not recorded—Isn't that right?

Mr. SCHOENLE: You admit then that that consent was not recorded?

Mr. CASSATT: Yes,—Just a moment—I shall have to withdraw that.

Mr. SOUTHWORTH: We object particularly to this being offered, as not binding the City in any form.

Mr. CASSATT: But you do not object to the form of it?

92 Mr. SOUTHWORTH: Yes, we do, because it has never been recorded and is offered here for the purpose of making up a title; we object to it because it is not record and there is no evidence of notice to the City.

Mr. CASSATT: But you do not object because we are not offering the original?

Mr. SOUTHWORTH: We do not care about the original; we are objecting to it upon the grounds I have said, but not because this one has not the signatures upon it.

The COURT: It goes to the relevancy and competency of it, but not to the form?

Mr. CASSATT: Yes.

The COURT: Let me ask a question, which may be in anticipation: It has been stated here that when the City took that street or highway, whatever it was, it took it subject to a grant. Is that so? Do you expect to offer evidence as to that, on either side?

Mr. CASSATT: As far as our claim may be made from the evidence we are offering, we expect to make that claim.

The COURT: What I had in mind was this: That an unrecorded mortgage, for instance, is good as between parties, one of whom assumes it. I was wondering whether that point is in the case? But I am anticipating. Proceed.

Mr. CASSATT: Yes, we will present that to Your Honor. Now, as to what I said about stipulating that it is not of record, I want to withdraw that.

Mr. SCHOENLE: Do you say that it was recorded?

Mr. CASSATT: Well, I don't say anything on the subject. I am simply offering that as a document passing between the parties.

The COURT: If the record does not show that it was recorded, I presume we would have to conclude it was not recorded.

93 Mr. CASSATT: Yes, I presume so. We offer now the contract with the Hamilton, Springfield & Carthage Turnpike Company and the Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, for the right of way over the Carthage Turnpike, which I will explain to your Honor, is the northernmost end of the line now in discussion.

Mr. SOUTHWORTH: We object on the ground of relevancy and competency and particularly object on the point that it is not recorded and there is no evidence that it was recorded.

Mr. CASSATT: Does it appear on the books of the County Recorder?—It was a grant by the County Commissioners.

Mr. SCHOENLE: No; this does not appear of record anywhere.

The said document so offered, is hereto attached, made part hereof, marked "Complainant's Exhibit No. 9".

Mr. SCHOENLE: That is that part that heretofore referred to Springfield pike in Hartwell, where there was no franchise?

Mr. CASSATT: I don't want to answer that question in that form. That was the place where I believe you claim there was no franchise.

Mr. SCHOENLE: We object to this especially, because that is a contract of which the City had no knowledge—no notice I should say, or the village of Hartwell had no notice.

We also object on the ground of relevancy and competency.

The COURT: I presume I should take it subject to the objection.

Mr. CASSATT: Yes. I now offer the proceedings of the Hamilton County Commissioners, March 14, 1900, and October 6, 1900, granting the Millcreek Valley Street Railroad Company a franchise over the Hamilton, Springfield & Carthage Turnpike, over the same ground covered by the contract to which I have just referred.

The said document is hereto attached, made part hereof, marked "Complainant's Exhibit No. 10."

94 Exhibit No. 10, is taken subject to the same objection as to relevancy and competency.

Mr. SCHOENLE: You admit that at this time, the date of this County Commissioner grant, Hartwell was an incorporated village?

Mr. CASSATT: Well, I think so, yes; I don't know.

The COURT: This last one that you offered is a matter of record in the County Commissioners' office?

Mr. CASSATT: Yes; that is from the County Commissioner's record.

We also offer the application of the Cincinnati Incline Plane Railway Company, under date of July 9, 1896, to the village of Hartwell for leave to construct its line over the streets therein mentioned—Wayne Avenue, generally speaking.

The said document is hereto attached, made part hereof, marked "Complainant's Exhibit No. 11."

(Taken subject to objection heretofore made.)

Mr. CASSATT: We offer now the certificate of the Clerk of the village of Hartwell as to publication of notice of that application, including a copy of the notice.

The said document so offered is hereto attached, made part hereof, marked "Complainant's Exhibit No. 12."

Mr. CASSATT: The next in chronological order is the ordinance which is attached to the answer as "Exhibit F", which we will not need to put in evidence, therefore.

The COURT: It is to be treated as part of the record?

Mr. CASSATT: Yes; it is attached to the answer. We will now offer a copy of the acceptance by the Cincinnati Incline Plane Railway Company of the ordinance of September 16, 1896, of the Village of Hartwell, the acceptance being dated September 25, 1896.

The said document so offered is hereto attached, made part hereof, marked "Complainant's Exhibit No. 13."

95 Mr. CASSATT: We also offer a communication from the Clerk of Hartwell to the Cincinnati Incline Plane Railway under date of October 5, 1896.

The said document is hereto attached, made part hereof, marked "Complainant's Exhibit No. 14."

(Said Exhibit No. 14, is taken subject to the same objection heretofore made.)

Mr. SCHOENLE: In reference now to Exhibit No. 12, advertisement and notice of application of the Incline Plane Railway: I see that this is merely something in the handwriting of a clerk; I do not know whether there is an original. I do not want to obstruct the proceedings, but I think we ought to know.

Mr. CASSATT: There is the original notice, with the copy of advertisement, (Handed to Mr. Schoenle).

Mr. SCHOENLE: All right; then I will withdraw the objection.

Mr. CASSATT: I now offer the proceedings of the Council of the Village of Hartwell, July, 9, 1896; I have no copy here at present, and I will read it into the record, (Volume 3, page 519.):

"Council met pursuant to adjournment with His Honor Acting Mayor J. D. Saver in the chair and the following named members answering to their names, viz:

"Cunning, Dickerson, Irwin, Lishewa, Lucius and Myers. Six.

The following opinion of the City Solicitor was presented:

"CINCINNATI, July 10, 1896.

"To the Honorable Board of Council, Village of Hartwell, Ohio.

"GENTLEMEN: I have examined the question as to whether under any construction of Sections 3437-3439 Revised Statutes
96 of Ohio, the advertisements of bids for the extension of a street railway could be dispensed with, as required in Section 2502, Revised Statutes of Ohio, which was submitted to me by your Committee, and am of the opinion that the advertisement cannot be dispensed with.

"As to the establishment of a new route for street railways I am of the opinion that it would be best to the old ordinances we have establishing Route No. 1, from the south corporation line to the north corporation line on Wayne Avenue, and establish the route as requested by the Cincinnati Incline Plane Railway Company, viz: From south corporation line north on Wayne to Section, west on Section to west corporation line, or west on Section to Burns and North on Burns to north corporation line, or both.

Respectfully submitted,

LOUIS B. SAWYER,
Village Solicitor."

The following application was read:

"CINCINNATI, OHIO, July 9, 1896.

"To the Honorable the Mayor and Council of the Village of Hartwell, Ohio:

(Then follows the application of the Cincinnati Incline Railway Company, which is already set out in evidence.)

Then follows this:

"There was also read in connection with above application an ordinance prepared by said Railway Company entitled, "An Ordinance granting to the Cincinnati Incline Plane Railway Company permission to lay its tracks from the south corporation line of the Village to the north corporation line thereof, over and along Wayne Avenue."

97 "Mr. Myers moved that Council now take a recess until next Monday evening at 7:30 o'clock. Which motion prevailed.

JOHN D. SAYERS,
Acting Mayor."

Attest:

F. H. MAPE, *Clerk."*

Mr. CASSATT: I will now offer the Minutes of the Meeting of the same body of July 13, 1896, found at page 521 of the same volume 3:

"JULY 13, 1896,
COUNCIL CHAMBER, HARTWELL, OHIO.

"Council met pursuant to recess with Acting Mayor J. D. Sayers in the chair and the following named members answering to their names:

Cunning, Dickerson, Lishewa, Lucious and Myers.

The following was read, viz:

"Report of the Committee on Street Railway Ordinance.

"Your Committee which was appointed to confer with the Cincinnati Incline Plane Railway Company in regard to the ordinance to be submitted for action of this Board, begs to report as follows:

"A meeting with Mr. Bradford the Manager of the Railway Company was held at which after full discussion the following conclusions were reached: That the ordinance prepared by the Railway Company and read to this Board as part of the report of the Citizens' Meeting would stand as the ordinance to be acted upon by Council, with two modifications, namely:

1. A local fare of five cents each way should be made between Hartwell and any point not further south than the south line of Elmwood.

98 2. The fifty dollars to be paid semi-annually by the Railway Company for repair of streets shall be applied to Wayne Avenue from south corporation line to Section Avenue, and

other streets where occupied the Railway Company shall pay proportionately for their repair.

"Your committee has had presented to it the question of passing an ordinance granting the right to lay tracks in our streets without advertising and has spent some time in studying this point. After careful consideration the Committee recommends that the usual method of advertising be adopted in this case.

W. W. MYERS,
CHARLES W. LUCIOUS,
Committee.

"Mr. Dickerson moved that the report be adopted. Which motion prevailed. Mr. Myers called for the ayes and nays on the above question, which were as follows:

Cunning, Dickerson, Lishewa, Lucious and Myers, Five."

Minutes of the Proceedings of the Commissioners of Hamilton County, September 8, 1897.

(Volume No. 27, page 200.)

"The following communication was submitted and read:

"PLEASANT RUN, HAMILTON CO., OHIO.

"To the Board of County Commissioners for Hamilton County, Ohio.

"GENTLEMEN: The Directors of the Hamilton, Springfield and Carthage Turnpike Company passed the following resolution:

"Resolved: That the Hamilton, Springfield and Carthage Turnpike Company hereby abandon all that part of its turnpike road as lies south of where the Lockland road known as Wyoming Avenue, in Hamilton County, Ohio, crosses or intersects said Hamilton, Springfield and Carthage Turnpike road in the village of Wyoming in said Hamilton County, Ohio, to its south terminus in the village of Hartwell, Hamilton County, Ohio, being a distance of two miles more or less.

"Resolved, further, that the president of the company be directed to notify the County Commissioners of Hamilton County, Ohio, of this action.

"Adopted September 2, 1897.

J. D. HUSTON, *President.*"

Mr. CASSATT: We will now offer in evidence the original vouchers showing the payment twice a year, from January 1, 1903, to December 31, 1913, inclusive, to the village of Hartwell and its successor, the City of Cincinnati, of the sum of \$134, the payments being in that sum in January and in July.

The vouchers recite as follows: The statements rendered by the Village of Hartwell, and paid, contain, in each case substantially the following language:

"Franchise Tax. Wayne Avenue. Six months, January 1, 1912 to July 1, 1912.....		\$74.00
Do., do., Russell Avenue and De Camp Avenue,		
Six Months, January 1, 1912 to July 1, 1912.....		60.00
		<hr/>
		\$134.00

Then below that:

"For six months from January 1, to July 1, 1912, as per ordinance."

They are all substantially in that form.

100 Mr. WARRINGTON: The payments to and including July 1, 1912, were to the village of Hartwell. On January 24, 1913, payments of the same amount were made to the treasurer of the City of Cincinnati, as shown by his receipt dated January 27, 1913, reading as follows:

"Received of the Ohio Traction Company \$134 for franchise tax from July 1, 1912 to January 1, 1913. Village of Hartwell, Ohio, Credit Public Service Fund. Henry T. Weyman, Payee, for City Treasurer."

And the same payment was made to the City of Cincinnati on January 1, 1913, and on December 31, 1913, a similar payment was made to the City of Cincinnati.

Mr. SCHOENLE: We object to the offer of all of these vouchers and receipts, on the ground of relevancy and competency.

Mr. WARRINGTON: We are not offering them.

The COURT: I suppose what you are objecting to is what is now in the record?

Mr. SCHOENLE: That is right: Not to the form in which it is offered.

Mr. WARRINGTON: We offer the vouchers showing payment to the village of Carthage of \$50, semi-annually, beginning March, 1903, to and including August, 1906. The receipt shows that such payments were the semi-annual franchise taxes due, the first payment being made in pursuance of a bill rendered by the Village Clerk of Carthage, Ohio, dated April 17, 1903, to the Millcreek Valley Street Railway Company, to semi-annual assessment on Lockland Avenue, due the first Monday in March, 1903, as per Section 9 of Franchise Ordinance No. 1039. \$50. Please remit to William Wihe, Treasurer.

101 Subsequent to 1906, the payments appear to have been made annually of \$100, instead of the semi-annual payments of \$50.

Mr. SCHOENLE: Under the same section of the franchise of the village of Carthage?

Mr. WARRINGTON: I presume so. Those payments were made to the village of Carthage to and including August, 1911, and on December 23, the Ohio Traction Company paid to the City of Cincinnati \$100 as the franchise tax for the year ending September 7, 1912, being the tax imposed by the original franchise granted by the

village of Carthage, Ohio. The receipt is dated December 26, 1912.

Mr. SOUTHWORTH: Let me add to that the statements as to the recital of the franchise taxes are on the forms of the Ohio Traction Company, and the City Treasurer's receipt, is on his form. "Received of the Ohio Traction Company \$100 for franchise tax, year ending September 7, 1912, village of Carthage, Ohio. Credit Public Service Fund. Henry H. Weyman, Payee, for City Treasurer."

On March 18, 1913, payment of \$50 was made to the City of Cincinnati by the Ohio Traction Company as franchise tax, and on September 6, 1913, a similar payment of \$50 was made to the City of Cincinnati. On February 28, 1914, a similar payment was made to the City of Cincinnati.

Mr. SCHOENLE: You have no acceptance or no payments made to the City after the 25 years' limitation expired?

Mr. WARRINGTON: The last payment was made February 14.

Mr. SCHOENLE: The franchise was dated in March, 1889.

The COURT: That will be a matter for argument.

Mr. WARRINGTON: I find these payments start with the
102 date the lessee operated; I have no doubt in the world that the same payments were made by the lessors before that.

Mr. SCHOENLE: We would not make any point on that, I think.

Mr. WARRINGTON: I have only offered the payments since our company had it.

Mr. SCHOENLE: We make no point as to that.

Mr. SOUTHWORTH: No.

Mr. CASSATT: We now offer the following from the record of the county Commissioners, being the Commissioners' Minutes, Volume 27, page 200, meeting of September 8, 1897: (Reading said proceedings:)

We offer to show that on or about April 10, 1914, a contract was entered into by the County with some contractor and is now being carried out, or is about to be carried out, for the repair of the Springfield Pike for its entire width, between Millcreek bridge and the south corporation line of Wyoming, Springfield Township; the Millcreek Valley bridge in question being south of the former limits of Hartwell, south of the south limits of Hartwell, and the south corporation line of Hartwell—of Wyoming, being the north boundary of Hartwell.

Mr. SCHOENLE: It is understood that all this is taken subject to our objection as to its relevancy and competency.

The COURT: Yes.

Mr. CASSATT: The fact is admitted, subject to relevancy and competency?

Mr. SCHOENLE: Yes.

The COURT: I suppose the argument will show the purpose of the offer?

Mr. CASSATT: Yes, Your Honor.

Mr. WARRINGTON: I think we have offered about all the evidence we have. I am looking over the papers and if there is any thing further we desire to offer, I think it will be something
103 that we can agree upon. I think we will rest subject to that.

The foregoing being all the evidence in chief offered by the complainant, the complainant thereupon rested its case.

Whereupon the defendant to maintain the issue upon its part to be maintained, offered evidence as hereinafter set forth, to-wit:

Mr. SCHOENLE: I think we may expedite this matter somewhat if counsel will agree upon one or two matters. Do you admit that the tracks of these companies were laid on Springfield Pike to the northern boundary of Hartwell as to which no ordinances have been introduced from the village of Hartwell, after the year 1900, merely keeping on with the laying of tracks from the point where the ordinances gave you the right to go? Do you admit that?

Mr. CASSATT: Well, I don't know what the fact is.

Mr. SCHOENLE: Then we will offer evidence.

THOMAS B. PUNSHON, caled in behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. SCHOENLE:

Q. Your name is Thomas B. Punshon?

A. It is.

Q. You are an engineer, are you not?

A. Yes.

Q. Civil Engineer and Surveyor?

A. Yes.

Q. For how many years?

A. About forty.

Q. You made a survey for the trustees of the Zoo Land Syndicate and for the Zoological Society, of Erkenbrecher Avenue?

A. Yes.

Q. You also prepared this plat, did you not, from the records?

A. Yes.

Q. Have you any objection to letting this plat be offered in evidence?

Mr. WARRINGTON: I don't think we can object.

The COURT: My understanding is that it is in evidence.

The said plat so referred to by counsel and the witness is offered in evidence by counsel for the defendant and the same is heretofore attached, made part hereof, marked "Defendant's Exhibit A."

Q. The facts found on that are accurately shown, are they not?

A. They are taken from the records at the Court House, yes.

Q. Will you please take this plat and tell the court through what unincorporated territory the line of the Carthage Pike passes, beginning at the Zoo and going northward to the present northern limits of the City, in 1889?

A. (Indicating on plat:) The first portion of the pike that was in an unincorporated district at that time began at the south line of Section 16, Millcreek Township, on the eastern side of the pike and extended north to Mitchell Avenue, the south boundary line of St. Bernard. That is a part of Section 16, Millcreek Valley. The second portion of the pike was from the Baltimore & Ohio South-

western Railroad, extending north to Bloody Run, in what is now in the incorporated village of St. Bernard, but was then in no incorporated village; also, from Bloody Run, extending north to the south boundary line of Carthage, which is now in the incorporated village of Elmwood Place, but was not incorporated at that time. The next portion of the pike is the western half of the Springfield Pike extending from De Camp Avenue to the northern boundary line of Hartwell, which was not incorporated at that time.

105 Q. Hartwell was incorporated in 1876?

A. 1876.

Q. Now, what is the situation today—so that court may understand it?

THE COURT: You mean now as to what is outside of the corporate limits?

Q. Yes?

A. The only portion outside of the corporate limits today is the west half of the Springfield Pike from De Camp Avenue to the north boundary of Hartwell.

Q. Now, Mr. Punshon, when you made the survey for the Zoo Land Syndicate and for the Trustees of the Zoological Society, you examined the records, did you not, as to the conveyances?

A. Yes.

Q. Did you find any record of the consent of the Zoo Land Syndicate to the Cincinnati Incline Plane Railway Company as offered in evidence, Exhibit No. 8?

A. No.

Q. There was none—or there is none, is there?

A. No, sir.

Cross-examination waived.

Also HOUSTON COATES called in behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. SCHOENLE:

Q. Your name is Houston Coates?

A. Houston Coates.

Q. You are Deputy County Surveyer of Hamilton County?

A. I am?

106 Q. Have you made a survey of the Carthage Pike, known formerly as the Springfield Pike, from De Camp Avenue to the north corporation line of what was known as the former village of Hartwell, to determine where the tracks of the Ohio Traction Company are?

A. Yes.

Q. Is that the plat that you made? (Indicating.)

A. Yes: this is the plat.

The said plat so identified by the witness is offered in evidence by counsel for the defendant and the same is hereto attached, made part hereof, marked "Defendant's Exhibit B."

Q. Is that a correct survey showing where those tracks are?

A. Yes.

Q. Does it show where the west corporation line of the former village of Hartwell and now the city, or within the city, was and is?

A. Yes.

Q. How is it represented on that plat?

A. It is represented on this plat by a red line.

Q. State to the court how much of the tracks have been and are in the village of Hartwell, now the City of Cincinnati, calling your attention to the single track and if any, to the double tracks?

A. I have a copy of the letter sent to you that shows it. An examination of the plat will show that for a distance of 18.90 feet north from the north side of De Camp Avenue, extended, both tracks—that the four rails of the Ohio Traction Company lay east of the section line, and that to a point 259.70 feet north of the north line of De-Camp Avenue, extended, the east rail of the southbound track lies for most of the distance, about parallel to, and 1 foot 1½ inches east of the section line.

Q. When you say "East of the section line," that means east—or that it was in the village of Hartwell, now in the city
107 of Cincinnati, doesn't it?

A. Yes; the Section line is the red line indicated on the plat.

Q. Now, go on?

A. From this last mentioned point northwardly to the northward or northwest corner of Section No. 1, that is a point about in the centre of Section Avenue, the southbound track lies west of, and the northbound track lies east of the section line. At the northwest corner of Section No. 1, the east rail of the southbound track lies 20 feet ½ inch west of the section line and at the south line of Hillsdale street the same rail is 20 feet 6¾ inches west of the section line, from which point it curves to the east and at the corporation line of the village of Wyoming is 12 feet 10¾ inches west of the section line; at the northwest corner of Section No. 1, the west rail of the northbound track is 2¾ inches east of the section line and from this point the rail swings gradually to the west until at the south line of Hillsdale street the west rail is 1¾ inches west of the section line. From this point it curves to the west until at the corporation line between Cincinnati and Wyoming the east rail of the northbound track is 2 feet 2⅞ inches west of the section line.

Q. And the plat correctly shows the facts found thereon, does it not?

A. Yes.

The Court:

Q. Is this evidence to show that the tracks, where they are west of that line, are on territory for which there never was a franchise?

Q. Exactly Your Honor?

Mr. SOUTHWORTH: On the east of the line if Your Honor please.

Mr. MAXWELL: If that is the purpose of the testimony, we wish to reserve our objection to it, as being incompetent.

108 The COURT: Well, proceed then.

Cross-examination.

By Mr. MAXWELL:

Q. How did you get your information as to what you call the boundary line of Hartwell?

A. From the plat in the Recorder's office showing the incorporation of the village of Hartwell.

Q. Have you got that plat or a copy of it?

A. I have a tracing of it, yes.

Q. Have you got it with you?

A. Yes.

Q. Let us see it?

A. (Witness produces plat or tracing.)

Q. First, you have no other knowledge or information with respect to the boundary line of Hartwell except as you derived it from that plat?

A. No, sir.

Counsel for the complainant offered in connection with the cross-examination of this witness the tracing so referred to and identified, and the same is hereto attached, made part hereof, marked "Complainant's Exhibit No. 15."

Q. On the top of this tracing I see "B. 5. P. 19. R. O."?

A. That has reference to the Plat Book—Book 5, page 19, Recorder's Office.

Q. You put those figures there?

A. I believe so, yes.

Q. Otherwise this is a copy of the plat that you found?

A. Yes—with some exceptions; on the original plat in the book there were some colors; it was tinted in the book; that tracing is not tinted.

Mr. SCHOENLE: Is this an exact copy?

A. That is a tracing, yes; a tracing. It is not tinted.

Mr. SCHOENLE: When you made this survey, Exhibit B,
109 where these rails were and are, you located the section line, did you not?

A. Yes.

Also LOUIS B. SAWYER, called in behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. SCHOENLE:

Q. Your full name, Mr. Sawyer?

A. Louis B. Sawyer.

Q. You are an attorney at law?

A. Yes.

Q. You were solicitor for the former village of Hartwell?

A. Yes.

Q. How long and when have you lived in the village of Hartwell, now part of the city of Cincinnati?

A. Since 1883, and in the vicinity—that is, I lived in Hartwell up until about fourteen years ago, then moved to Wyoming.

Q. Calling your attention to the ordinance passed in 1900, of the former village of Hartwell, over De Camp Avenue to Springfield Pike, when were the tracks laid on Springfield Pike as it was then called, to the northern boundary of Hartwell?

A. Some time after the passage of this ordinance and after the track had been laid on Wayne Avenue—from Wayne Avenue west to the lower portion of the village pursuant to that ordinance.

Q. Then they just kept on laying their tracks?

A. Yes.

Q. And the track is laid today as it was then?

A. Yes.

Cross-examination waived.

110 Mr. SCHOENLE: I wish to offer a certified copy of the records of the Commissioners of Hamilton County, on the surrender that was offered in evidence from the Hamilton, Springfield & Carthage Turnpike Company, in which it surrendered its part of the Springfield pike. I offer the opinion of the County Solicitor on this and to make the record absolutely clear we will offer the surrender itself, dated September 8, 1897 and the opinion of the Solicitor on the same. So that the record may be complete I may as well refer to 87" Ohio Laws, page 245, showing the effect of the surrender.

THE COURT: You have the action of the municipality upon the surrender, have you?

Mr. SCHOENLE: No. This is a surrender by the Turnpike Company to the County; it gives up its rights.

THE COURT: Oh, yes.

Mr. SCHOENLE: It does not reserve or mention any rights of the Traction Companies whatsoever. We will also offer the 87 O. L., Page 245, in connection with these.

The said two documents so offered are hereto attached, made part hereof, marked "Defendant's Exhibit C-1," and "Defendant's Exhibit C-2."

Counsel for the defendant also offered in evidence a certified copy of the application of the Cincinnati Incline Plane Railway Company to the Village of Carthage, bearing date of January 28, 1889, which said document is hereto attached, made part hereof, marked "Defendant's Exhibit D."

Counsel for the defendant also offered in evidence a certified copy of the franchise given by the village of Carthage to the Incline Plane Railway Company, dated March 19, 1889, found in Vol. 3 of the Minute Books, at pages 157, 159, which said document is

111 hereto attached, made part hereof, marked "Defendant's Exhibit E".

Counsel for the defendant also offered in evidence a certified copy of the amendment to the franchise of March 19, 1889, said amend-

ment bearing date of April 16, 1889, which said document is hereto attached, made part hereof, marked "Defendant's Exhibit F".

Counsel for the defendant also offered in evidence a certified copy of the acceptance of the Cincinnati Incline Plane Railway Company, dated April 16, 1889, which said document is hereto attached, made part hereof, marked "Defendant's Exhibit G."

Mr. CASSATT: May it be understood that there is an objection as to the relevancy of that?

The COURT: Very well.

Counsel for the defendant also offered in evidence a certified copy of the application of the Cincinnati Incline Plane Railway Company to the Village of Carthage for an extension of its franchise, bearing date of August 7, 1894. Said document is hereto attached, made part hereof, marked "Defendant's Exhibit H".

Mr. SCHOENLE: The Extension Franchise is already in evidence.

Thereupon SAMUEL B. HAMMEL, called in behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. SCHOENLE:

Q. Your full name, please?

A. Samuel B. Hammel.

Q. You are an attorney at law?

A. Yes.

Q. You were Village Solicitor of the Village of Carthage, were you not?

A. Yes.

Q. During what time?

112 A. I think from about 1884 on for a number of years, fifteen or sixteen years, after 1884.

Q. And you have been a resident of the village for how long?

A. Since about 1883, or 1884, I don't exactly remember.

Q. You are familiar with the records of the village, are you not, and were, at the time this 1889 franchise was granted?

A. Yes.

Q. And the extension was granted in 1894?

A. Yes.

Q. Do the records of the village show any advertisement for competitive bidding for either of the two franchises, of the former Village of Carthage?

A. No, sir.

Q. Nothing of that kind was done?—Nothing of that kind was attempted, or done, was there?

A. No, sir.

Q. When did the Carthage Pike cease to be a toll road, south of Carthage?

A. Very shortly after the granting of the original franchise by the County Commissioners; I can't exactly say, but it has been at least fifteen years ago—probably twenty years ago.

Cross-examination waived.

Also DENNIS J. RYAN, called in behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. SCHOENLE:

Q. Your name is Dennis J. Ryan?

A. Dennis J. Ryan.

Q. You are Assistant City Solicitor, are you not?

A. I am.

113 Q. You have made an examination, have you not, of the title of the real estate on Erkenbrecher Avenue from Vine Street to the Carthage Pike?

A. That portion of Erkenbrecher Avenue west of Vine, including all of the property of the Zoological Garden, the Zoo Land Syndicate and part of the French Sub-division.

The COURT: That is what you examined?

A. Yes, sir.

Q. Would that include the part dedicated to the City?

A. It included all of Erkenbrecher Avenue.

Counsel for the defendant offered in evidence a certified copy of the dedication of the Zoo Land Syndicate subdivision to the City of Cincinnati, received and recorded on June, 27, 1890, in Plat Book No. 9, pages 49 and 50, Hamilton County, Ohio, records. The said document is hereto attached, made part hereof, marked, "Defendants' Exhibit I." Counsel for the defendant also offered in evidence a certified copy of the record of conveyances and plat and the chain of title of the real estate in the street known as Erkenbrecher Avenue, from Vine Street to Carthage Pike, received and recorded on June 8, 1875, in Plat Book No. 4, page 244, Hamilton County, Ohio, records. The said document is hereto attached, made part hereof, marked, "Defendant's Exhibit J."

Mr. MAXWELL: All of his evidence with respect to title is objected to as irrelevant.

The COURT: Very well. Let the record so show.

Counsel for the defendant also offered in evidence a certified copy of survey and subdivision of two lots of land belonging to Benjamin

114 P. Hinman, in section 15, town. 3, F. Range 2, M. P., one containing 54 acres, more or less, conveyed to him by deed dated August 25, 1865, and the other eleven acres, conveyed to him by David P. Marshal by deed dated July, 1, 1865 received and recorded on September, 1, 1865 in Plat Book No. 2, page 258 Hamilton County, Ohio, records. The said document is hereto attached, made part hereof marked, "Defendant's Exhibit K."

Counsel for the defendant also offered in evidence a certified copy of a deed from George Wilshire and others to John Hauck, received and recorded on November 4th, 1884, in Deed Book No. 577, page 132, Hamilton County, Ohio, records. The said document is hereto attached, made part hereof, marked "Defendant's Exhibit "L."

Counsel for the defendant also offered in evidence a certified copy of a lease from John Hauck to the Zoological Society of Cincinnati, received and recorded on March 14, 1885, in Lease Book No. 77,

page 203, Hamilton County, Ohio, records. The said document is hereto attached, made part hereof, marked "Defendant's Exhibit M".

Counsel for the defendant also offered in evidence a certified copy of a deed from the Zoological Society of Cincinnati to Albert G. Erkenbrecher and others, received and recorded on June, 27, 1887, in Deed Book Number 696, page 130, Hamilton County, Ohio, records. The said document is hereto attached, made part hereof, marked "Defendant's Exhibit N."

Counsel for the defendant also offered in evidence a certified copy of a deed from John Hauck to Florence Marmet, Julius Dexter and Albert G. Erkenbrecher, received and recorded on February 4, 1887, in Deed Book No. 628, page 181, Hamilton County, Ohio, records. The said document is hereto attached, made part hereof, marked, "Defendant's Exhibit O."

Mr. SCHOENLE: Now, in order to show that Florence Marmet, Julius Dexter and Albert Erkenbrecher were the Trustees of the Zoological Land Syndicate from which these gentlemen claim, we offer the petition, answers and decrees in the case of Robert Allison vs. Albert G. Erkenbrecher et al., No. 80816, Hamilton County Common Pleas Court, with the request that we be permitted to substitute copies for these originals which are court papers.

The said documents so offered in evidence are by true and compared copies, hereto attached, made part hereof, marked as follows:

Petition in above entitled case: "Defendant's Exhibit P."

Answer of Lucy Marmet, "Defendant's Exhibit P-1."

Answer of William Marmet, Ida Marmet and Edwin Otto Marmet by guardian ad litem, "Defendant's Exhibit P-2."

Answer of Lucie Marmet, widow, "Defendant's Exhibit P-3."

Answer of William Marmet, Ida Marmet and Edwin Otto Marmet, by guardian ad litem, "Defendant's Exhibit P-4."

Answer of Julius Dexter and Albert G. Erkenbrecher, "Defendant's Exhibit P-5."

Order appointing guardian ad litem, "Defendant's Exhibit P-6."

Summons in above entitled cause, "Defendant's Exhibit P-7."

Decree in above entitled cause, June 7, 1888, "Defendant's Exhibit P18."

Thereupon, WALTER S. DRAPER, called in behalf of the defendant being first duly sworn testified as follows:

Examined by Mr. SCHOENLE:

116 Q. Your name is Walter S. Draper?

A. It is.

Q. You are the Vice President of the Ohio Traction Company?

A. I am, and Secretary.

Q. Vice President and Secretary?

A. I am.

Q. As such Vice President and Secretary did you not receive prior to April, 14, 1914, a copy of the ordinance that was proposed to be passed by the council of the city of Cincinnati?

A. I did.

Q. And you acknowledged receipt of that in this letter, did you not? (Exhibiting letter).

A. I did.

Q. And subsequent to that time the Council Committee on Street railroads had two sessions, had it not?

A. I am not aware of it.

Q. That committee had a session?

A. Yes, I know they had a session.

Q. Then that was before this ordinance was recommended for passage?

A. Yes.

Q. And you had an opportunity in behalf of your corporation to be present before that committee?

A. I presume I would have been given an opportunity if—

MR. MAXWELL: Never mind about your presumptions, Mr. Draper.

Q. What is your answer?

A. I don't know.

Q. Did not I tell you that you could be present?

MR. WARRINGTON: Are you a member of Council, Mr. Schoenle?

Q. I am the City Solicitor?

117 A. I do not recall, Mr. Schoenle, your telling me that.

Q. You knew that those committee meetings were going to take place, did you not?

A. I think you told me a committee meeting was going to take place.

Q. And I told you when it would take place?

A. I think you did.

Counsel for the defendant offered in evidence the letter so identified by the witness and the same by true and compared copy is hereinafter set forth as, "Defendant's Exhibit Q."

"EXHIBIT Q."

The Ohio Traction Company.
General Offices, Traction Building.

CINCINNATI, OHIO, Apr. 14, 1914.

Mr. Walter M. Schoenle, City Solicitor, Cincinnati, Ohio.

DEAR SIR: I beg to acknowledge receipt of your letter of April 13th, enclosing copy of ordinance submitted by you to Council Committee with reference to fares in the Millcreek Valley, for which I thank you.

Yours Very truly,

WALTER A. DRAPER,
Vice President.

D-m.

Cross-examination.

By Mr. WARRINGTON:

Q. When did the company in which you were interested take hold of this property, Mr. Draper?

A. The Cincinnati Interurban Company took hold of the property in September, I think, 1902.

Q. September, 1902?

A. Yes.

118 Q. Can you state approximately how much money the Cincinnati Interurban Company and the Ohio Traction Company have spent on this property since the date of their lease in 1902?

Mr. SCHOENLE: I object.

The COURT: The road is a system, is it?

Mr. WARRINGTON: Well, they have one road extending out through these villages to Hamilton.

The COURT: Well, it may be that if any part of it were disturbed or destroyed it would affect the whole of it. I don't know yet whether it is a material matter or not, but I had perhaps better take the evidence. I should think you might have a tabulated statement showing that.

Mr. WARRINGTON: If your Honor will permit us to get that up?

The COURT: I don't know whether that will affect it or not?

Mr. WARRINGTON: If your Honor will permit us to get that up and show it to the other side, we will be very glad to do so?

Mr. SCHOENLE: You are submitting your case and if you have any statement you can offer it and we will see what it is.

The COURT: Well, I think I should take this evidence.

Mr. SCHOENLE: I am objecting to the competency of and relevancy of the evidence and also on the ground because it is too indefinite.

The COURT: Well, I think I had better take it. Proceed.

Counsel for the defendant excepted to the ruling of the Court.

By Mr. WARRINGTON:

Q. (Question read)?

A. In the way of improvements and betterments we have
119 spent about \$450,000 to the best of my recollection.

Q. When the Cincinnati Interurban Company took this road in 1902, was it constructed and in operation over the same route that it is operating upon now?

A. It was.

Q. It had been built and was being operated when this company took it from the Zoo to Hamilton, was it not?

A. It was.

Q. And you say the lessee companies have spent about \$450,000 on improvements on that line since?

A. To the best of my recollection.

Counsel for the defendant objected to the above evidence on the

ground heretofore stated; the court overruled the objection, to which ruling of the court counsel for the defendant at the time excepted.

Q. Now, can you tell whether any part of that \$450,000 was spent on that line between the Zoological Garden and the north line of the former village of Hartwell?

Mr. SCHOENLE: We object on the same ground.

The COURT: I will take it all subject to the objection.

A. It was.

Q. Can you state approximately what proportion of that was spent on that line?

A. I am unable to say at the present time just the proportion.

Q. What proportion is the line between the Zoological Garden and the north line in Hartwell, as compared with the entire line of this company, as to mileage and passengers carried thereon, approximately?

A. As to mileage, I should say that it is about, near one-half; as to the carriage of passengers it is probably a little in excess of that.

Mr. SOUTHWORTH: You mean one-half of the mileage?

A. Yes.

120 The COURT: Is the road less than sixteen miles in length?

A. No, the line including all the trackage, from the city is thirty-six miles in length; that means single track mileage, you understand, and from the Zoo to Hartwell, including both branches would be—my statement would be at the present time a little in excess of one-half of the mileage of the road itself, that is, owned by the road itself. That does not include of course from the Zoo to the heart of Cincinnati.

Q. That is merely from the Zoo out northwardly?

A. Yes, the mileage of the road proper.

Q. Well now, bearing in mind that fact, can you give to the court any idea of the proportion of the \$450,000 spent on improvements, that has been spent between the Zoo and the north line of Hartwell?

Mr. SCHOENLE: I object; the witness has stated before that he could not give it and we should not have his ideas here.

The COURT: Well, I will see what he says. If you have any information upon it, give it and we will determine the materiality of it later.

Counsel for the defendant excepted to the ruling of the court.

A. The bulk of the money spent for improvements in any one particular job was in connection with the paving and the relaying of the tracks on Carthage Pike, so that the larger amount of this sum would have been spent south of the north limits of Carthage, if I understand the question.

Q. What part of the Carthage Pike?

Above question is objected to and taken subject to the objection.

121 A. Through St. Bernard, Elmwood Place and Carthage, to what is known as Gas Hall.

By Mr. SCHOENLE:

Q. That is, then where those improvements that you speak of cost you so much?

A. The paving and the relaying of the tracks.

Q. Gas Hall is the northerly boundary of Carthage, or near there?

A. Not exactly. Carthage extends a little further north.

Q. But that is in Carthage?

A. It is in Carthage.

Q. That is as far as your improvement went?

A. As far as that paving went, to my recollection.

By Mr. WARRINGTON:

Q. Have you ever done any paving in Hartwell?

Mr. SCHOENLE: I object to the form of that question and also to the question itself.

The COURT: Well, he can answer that yes or no.

A. We have done street repairing, which was equivalent to paving and we have done paving.

Q. In the village of Hartwell?

A. In the village of Hartwell.

Q. That was done at the request of the village of Hartwell?

A. It was.

Q. On more than one occasion?

A. I think so. It was a franchise requirement.

All of the above evidence is taken subject to objection by the defendant.

By Mr. SCHOENLE:

Q. Mr. Draper, this Traction line we have been speaking about starts from the heart of the city, does it not, or from where?

122 A. From Sixth and Walnut.

Q. In the city of Cincinnati?

A. The cars are operated through from Sixth and Walnut northwardly.

Q. Now, from that point to the Zoo is about two miles, is it not?

A. It is about three and one-half miles, I think, Mr. Schoenle.

Q. Three and one-half miles; and from the Zoo to the northern boundary of the city is about how much in distance?

A. Probably a little less than one mile.

Q. I don't want to have you give a wrong impression, Mr. Draper, a wrong answer. From the Zoo northwardly, to the northern boundary of the city is how far?

A. You mean the extreme northwardly boundary?

Q. Yes.

A. About five and one-half, between five and five and one-half miles.

Q. So that the distance that your line travels, as applicable to the case here, is about eight and one-half miles, is that it?

A. I don't understand what you mean by "applicable to the case here."

Q. We are not talking about your line after it leaves the city?

A. You mean from the center of the city to the northerly boundary?

Q. Yes?

A. About 8.8 miles, taking every division.

Q. After it leaves the city it goes where?

A. One branch goes into Lockland and the other into Wyoming.

By Mr. WARRINGTON:

Q. This company does not own the tracks out to the Zoo Garden, does it?

A. It does not—the Ohio Traction Company?

Q. The tracks are owned by another company and the Ohio Traction Company operates to the Zoo Garden over the tracks of the Cincinnati Traction Company?

A. It does, yes.

And the foregoing was all the evidence offered by the defendant.

Mr. WARRINGTON: I have found one ordinance of the Village of Hartwell that is not printed and I will ask counsel to look at it.

(Said document is handed to counsel.)

Counsel for complainant offered in evidence the ordinance referred to, being Ordinance No. 698, granting to the Millcreek Valley Street Railroad Company the right to lay a double track on the street line between Lots No. 89 and No. 95 of the Hamilton County House Building Association subdivision of Hartwell and connecting Russell Avenue with the street now known as De Camp Avenue; which said document is hereto attached, made part hereof, marked "Complainant's Exhibit No. 16."

The COURT: Let me inquire—there have been no steps taken for a referendum in this matter?

Mr. SCHOENLE: No.

Mr. CASSATT: No; this ordinance is in as much force and effect as it can have.

Mr. SCHOENLE: Subject to the orders of Your Honor.

The COURT: Then proceed.

Thereupon the complainant rested its case.

And the foregoing was all the evidence offered by either party in the case.

124 *Entry Ordering Exhibits Sent to the Supreme Court Without Being Copied. Entered August 4th, 1914, by Judge Sater.*

Upon application therefore it is hereby ordered that all the exhibits in the above entitled case shall be sent to the Clerk of the Supreme Court of the United States, at Washington, D. C., with the other papers on appeal in lieu of copies of said exhibits; the said exhibits to be safely kept by the Clerk of the Supreme Court and

returned to the Clerk of this Court after the final disposition of this cause and the appeal therein in the Supreme Court.

125

Precipe.

Filed August 6, 1914.

To the Clerk:

Please prepare a transcript on appeal of the following papers, pleadings and documents in the above entitled case, to-wit:

- (1) Bill of Complaint.
- (2) Subpœna.
- (3) Motion for preliminary injunction.
- (4) Answer.
- (5) Memorandum of Judge Sater granting restraining order.
- (6) Restraining order and return on same.
- (7) Memorandum of Judge Sater on final hearing.
- (8) Assignment of errors.
- (9) Decree.
- (10) Bond on Appeal.
- (11) Citation on appeal and return.
- (12) Entry ordering reproduction in full.
- (13) Transcript of testimony as filed (not including the file of exhibits).
- (14) Entry ordering exhibit sent to the Supreme Court.
- (15) This precipe.

WALTER M. SCHOENLE,
Solicitor of Cincinnati.
CONSTANT SOUTHWORTH,
Ass't Solicitor of Cincinnati.

August 5, 1914.

Service of a copy of the foregoing precipe is hereby acknowledged.

*Counsel of Record for The Cincinnati and
Hamilton Traction Co. and The Ohio
Traction Company, Appellees.*

STATE OF OHIO,
Hamilton County, ss:

Raymond C. Dieckman, being first duly sworn, says that he has served the foregoing precipe on The Cincinnati & Hamilton Traction Company and The Ohio Traction Company and their counsel
126 by delivering a true copy of the foregoing at the offices of George Warrington, Ellis J. Kinkead, Lawrence Maxwell and Alfred A. Cassatt, counsel for said parties and appellees herein.

RAYMOND C. DIECKMAN.

Sworn to before me and subscribed in my presence this 6th day of August, 1914.

SAMUEL STERN,
Notary Public, Hamilton County, Ohio.

127 United States District Court, Southern District of Ohio,
Western Division.

In Equity. No. 35.

THE CINCINNATI AND HAMILTON TRACTION COMPANY, a Corporation,
and The Ohio Traction Company, a Corporation, Plaintiffs.

vs.

THE CITY OF CINCINNATI, a Municipal Corporation, Defendant.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

I, B. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify that the foregoing pages, numbered from 1 to 126, inclusive, contain true and correct copies of those portions of the record and proceedings in the above entitled cause which were requested to be included in the record on appeal herein, as appears from the præcipe filed in said cause on August 6th, 1914, a copy of which will be found on page 125 hereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, Ohio, this 17th day of August, A. D. 1914.

[Seal United States District Court, Southern Dis. of Ohio.]

B. E. DILLEY, *Clerk*,
By F. A. HIGHT, *Deputy*.

128 UNITED STATES OF AMERICA, ss:

Supreme Court of the United States.

To the Cincinnati & Hamilton Traction Company, a corporation under the laws of Ohio, and The Ohio Traction Company, a corporation under the laws of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, within thirty (30) days from this date, pursuant to an appeal duly allowed by the United States District Court, Southern District of Ohio, Western Division, and filed in the Clerk's office of said Court on this date, wherein The City of Cincinnati, having been defendant in a case brought by the said The Cincinnati & Hamilton Traction Company and the said The Ohio Traction Company, is now appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said The City of Cincinnati, appellant, as in said appeal and assignments of error mentioned should

not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 4th day of August, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States one hundred and thirty-ninth.

J. E. SATER,
District Judge.

129 Service of this citation on The Cincinnati & Hamilton Traction Company and The Ohio Traction Company is hereby acknowledged and their appearance is hereby entered.

_____,
_____,
*Counsel of Record for The Cincinnati & Hamilton
Traction Company and The Ohio Traction Company.*

[Endorsed:] (11). E—35. q. Supreme Court of the United States. Marshal's Civil Docket No. 7463. The City of Cincinnati, a municipal corporation, Appellant, vs. The Cincinnati & Hamilton Traction Company, and The Ohio Traction Company, Appellees. Citation on Appeal. Filed Aug. 12, 1914. B. E. Dilley, Clerk.

Received this writ at Cincinnati, Ohio, on August 10, 1914, and on the same day I served The Cincinnati & Hamilton Traction Company, a corporation, etc., by delivering a true copy of this writ, with the endorsements thereon, to Alfred J. Becht, Secretary of said Company, by handing same to him personally at Cincinnati, Ohio;

And on August 10, 1914 I served the within named The Ohio Traction Company, a corporation, etc., by delivering a true copy of this writ, with the endorsements thereon, to D. J. Downing, Assistant Secretary of said Company, by handing same to him personally at Cincinnati, Ohio.

No higher representative or chief officer of either of the above named, The Cincinnati & Hamilton Traction Company or The Ohio Traction Company, found in this district upon whom to effect service.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By **W. J. SANDERSON,**
Deputy.

Fees:

1 copy	\$.30	(1 copy furnished.)
2 services	4.00	
1 mi.06	
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	\$4.36	

130 In the District Court of the United States, Southern District of Ohio, Western Division.

Equity. No. 35.

THE CINCINNATI & HAMILTON TRACTION COMPANY, a Corporation,
and THE OHIO TRACTION COMPANY, a Corporation,

vs.

THE CITY OF CINCINNATI.

Exhibits Offered by Complainant- and Defendant in Above Entitled Cause.

Complainants' Exhibits "1" to "16."
Defendant's Exhibits "A" to "Q."

Filed Aug. 4, 1914. B. E. Dilley, Clerk.

131

COMP. EX. No. 1.

These Articles of Incorporation of The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company,

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporations laws of said State, do hereby certify:

First. The name of said corporation shall be The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company.

Second. Said corporation is to be located at Cincinnati, in Hamilton County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of constructing, maintaining and operating an electric streetrailroad for the transportation of passengers, packages, express matter, United States mail, baggage and freight, upon the public highways, and private property where necessary, between the cities of Cincinnati, Hamilton County, Ohio, and Dayton, Montgomery County, Ohio, passing through the counties of Hamilton, Butler, Warren and Montgomery, and also passing through the municipal corporations of Carthage, Glendale, Hamilton, Middletown, Franklin, Miamisburg and West Carrollton, and such other municipal corporations as may lie along the route so indicated; and for the purpose of exercising all other powers conferred by law upon companies incorporated for such purposes; including the extension, maintenance and operation of its road into and through the Cities of Cincinnati and Dayton, as occasion may require.

Fourth. The capital stock of said corporation shall be Five hundred thousand Dollars (\$500,000), divided into five thousand (5,000) shares of One hundred Dollars (\$100.) each.

132 In witness whereof, We have hereunto set our hands, this
20th day of December, A. D. 1894.

A. HICKLENLOOPER.
CHARLES FLEISCHMAN.
L. C. WEIR.
H. H. HOFFMAN.
HENRY B. MOREHEAD.
OREN BRITT BROWN.

THE STATE OF OHIO,
County of Hamilton, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said county, this 20th day of December, A. D. 1894, the above named A. Hicklenlooper, Charles Fleischman, H. H. Hoffman, Henry B. Morehead, Oren Britt Brown, and L. C. Weir, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[SEAL.]

CHAS. E. PRIOR,
*Notary Public in & for
Hamilton County, Ohio.*

THE STATE OF OHIO,
County of Hamilton, ss:

I, John B. Peaslee, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that Charles E. Prior, whose name is subscribed to the foregoing acknowledgment as a Notary Public, was at the date thereof a Notary Public, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Cincinnati, this 20th day of December, A. D. 1894.

JOHN B. PEASLEE, *Clerk,*
By W. H. SARGENT, *Dep.*

133 The Cincinnati, Hamilton, Middletown & Dayton Street
Railroad Company.

Certificate of Subscription.

CINCINNATI, OHIO, Dec. 26th, 1894.

To the Secretary of State, Columbus, Ohio:

We, the undersigned, a majority of the incorporators of The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Com-

pany, do hereby certify, that on the 22nd day of December, 1894, all the incorporators of said Company, did order, in writing, that books be opened for subscriptions to the capital stock of said Company, at the office of A. Hickenlooper, Fourth & Plum Streets, Cincinnati, Ohio, on the 26th day of December, 1894, at 3 o'clock, P. M., and, at the same time, did waive, in writing, the notice by publication of the time and place of such opening of books of subscription, required by law; and further, said books having been opened at the time and place ordered, that ten per cent. of the capital stock of said Company has been subscribed.

A. HICKENLOOPER,
CHARLES FLEISCHMAN,
L. C. WEIR,
H. H. HOFFMAN,
OREN BRITT BROWN,
Incorporators.

134 *Certificate of Change of Name of the Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company.*

Copy of Amendment to the Articles of Incorporation of The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company.

"Resolved, That the corporate name of this Company be changed from that of the Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company to that of The Mill Creek Valley Street Railroad Company, and the President and Secretary are hereby directed to transmit, duly certified by their official signatures, and the seal of said Company, to the Secretary of State of the State of Ohio, this said resolution for change of name of said company, pursuant to law."

Certificate of Amendment.

To the Secretary of State, Columbus, Ohio:

The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company, acting by its President and Secretary, hereby certifies that the foregoing is a true copy of the original amendment to the articles of incorporation of The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company, which was adopted by the votes of the owners of more than three-fifths of its capital stock, at a meeting thereof, held on the 15th day of July, 1898, at the office of said Company in Cincinnati, Ohio, notice of which meeting was duly waived in writing as authorized by law.

In testimony whereof, the President and Secretary of The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company, acting for and on behalf of said corporation, have hereunto set

their hands, (there being no seal,) this 22nd day of July, A. D. 1898.

THE CINCINNATI, HAMILTON AND
DAYTON STREET RAILROAD
COMPANY,

[SEAL.]

By L. C. WEIR, *President*.
O. B. BROWN, *Secretary*.

135 Increase of Capital Stock, Common and Preferred.

The Mill Creek Valley Street Rail Road Company hereby certifies that at a meeting of its directors, held at the office of said Company on the fourth day of June, A. D. 1898, the assent in writing of three-fourths in number of the stockholders, representing more than three-fourths of the capital stock of said Company, having been first previously obtained, the following resolution was adopted, viz:

"Resolved, That the capital stock of said The Mill Creek Valley Street Rail Road Company be and the same is hereby increased from \$500,000 to \$1,750,000, and that \$500,000.00 of said increase be issued and disposed of as common stock in 5000 shares of \$100.00 each, and that \$750,000.00 of said increase be issued and disposed of as preferred stock, in seven thousand five hundred shares of \$100 each, and that the purchasers and owners thereof be entitled to receive a dividend on said preferred stock of five per cent. per annum, out of the annual profits, in preference to, and before any dividend is paid to other stockholders, and that the holders of said preferred stock may, at their election, convert the same into common stock, and the President and Secretary are hereby authorized to carry out the provisions of this resolution, and issue certificates of stock to the subscribers thereof."

In witness whereof, said The Mill Creek Valley Street Rail Road Company, has caused its corporate seal to be hereto affixed and its President and Secretary to subscribe this certificate, this — day of —, A. D. 18—.

THE MILL CREEK VALLEY
STREET RAILROAD COM-
PANY,

[Corporate Seal.]

By L. C. WEIR, *President*.
O. B. BROWN, *Secretary*.

(10c. I. R. Stamp.)

136 UNITED STATES OF AMERICA:

State of Ohio,

Office of the Secretary of State:

I, Chas. H. Graves, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of the Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company, filed in this office on the 21st day of

December, A. D. 1894, and recorded in Volume 63, Page 662 of the Records of Incorporations; of the certificate of subscription of said company, filed in this office on the 29th day of December, A. D. 1894, and recorded in Volume 62, Page 239 of the Records of Incorporations; of the certificate of amendment to the articles of Incorporation of said company, changing its corporate name to The Mill Creek Valley Street Railroad Company, filed in this office on the 3rd day of August, A. D. 1898, and recorded in Volume 75, Page 319 of the Records of Incorporations; and of the certificate of increase of capital stock of said The Mill Creek Valley Street Railroad Company, filed in this office on the 30th day of August, A. D. 1898, and recorded in Volume 72, Page 471 of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 4th day of June, A. D. 1914.

CHAS. H. GRAVES,
Secretary of State.

[The Seal of the Secretary of State of Ohio.]

136a [Endorsed:] Articles of Incorporation of The Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company.
No. 1.

137 *Articles of Incorporation of The Hamilton, Glendale and Cincinnati Traction Company.*

These articles of Incorporation of The Hamilton, Glendale and Cincinnati Traction Company, Witnesseth:

That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Hamilton, Glendale and Cincinnati and Traction Company.

Second. The general offices of the Company shall be located and its principal business there transacted at Cincinnati, Ohio.

Third. Said corporation is formed for the purpose of building, acquiring, owning, leasing, operating and maintaining a traction railroad to be operated by electricity, or other improved motive power, having Cincinnati, Ohio, and Hamilton, Ohio, for its termini; passing in and through the counties of Hamilton and Butler..

Fourth. The capital stock of said corporation shall be two hundred and fifty thousand dollars (\$250,000), divided into twenty-five hundred (2500) shares of one hundred dollars (\$100) each.

In witness whereof, We have hereunto set our hands, this 19th day of January, A. D. 1901.

W. P. McCARTY.
WM. S. MUNSELL.
LEO. KELLY.
CLAUDE ASHBROOK.
FRED'K E. NIEDERHELMAN.

STATE OF OHIO,

County of Hamilton, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said county, this 19th day of January, A. D. 1901, 138 the above named W. P. McCarty, Wm. S. Munsell, Leo Kelley, Claude Ashbrook and Fred'k E. Niederhelman, who each severally acknowledged the signing of the foregoing articles of incorporation, to be his free act and deed, for the the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

10c. I. R. Stamp.

[SEAL.]

CARL W. UTTER,
Notary Public in and for said County.

10c. I. R. Stamp.

THE STATE OF OHIO,

County of Hamilton, ss:

I, Geo. B. Harte, Clerk of the Court of Common Pleas, a court of record within and for the County and State aforesaid, do hereby certify that it appears of record in this office that Carl W. Utter, whose name is subscribed to the annexed instrument was at the time of taking such proof, or acknowledgment, a Notary Public, in and for said County, duly commissioned and qualified, and duly authorized to administer oaths, to take acknowledgments of deeds, etc.

And further, that I am well acquainted with the handwriting of said Carl W. Utter, and verily believe that the signature to the said certificate, or proof of acknowledgment, is genuine.

In testimony whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Cincinnati, this 21st day of January, A. D. 1901.

[SEAL.]

GEO. B. HARTE, *Clerk,*
By LOUIS N. REIF, *Deputy.*

(10c. I. R. Stamp.)

139 The Hamilton, Glendale and Cincinnati Traction Company.

Certificate of Subscription.

CINCINNATI, Ohio, January 23rd, 1901.

To the Secretary of State, Columbus, Ohio:

We, the undersigned incorporators of The Hamilton, Glendale and Cincinnati Traction Company, do hereby certify, that on the 23rd day of January 1901, all the incorporators of said Company did order, in writing, that books be opened for subscriptions to the capital stock of said Company, at the office of Burch & Johnson, 401-402 Johnston Building, Cincinnati, Ohio, on the 23rd day of January, 1901, at 2 o'clock P. M.: and at the same time, did waive in writing, the notice by publication of the time of place of such

opening of books of subscription, required by law; and further, said books having been opened at the time and place ordered, that ten per cent of the capital stock of said Company has been subscribed.

(10¢ I. R. Stamp.)
 W. P. McCARTY,
 WM. S. MUNSELL,
 LEO KELLY,
 CLAUDE ASHBROOK,
 FRED'K E. NIEDERHELMAN,
Incorporators.

140 UNITED STATES OF AMERICA,
State of Ohio,
Office of the Secretary of State:

I, Chas. H. Graves, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of The Hamilton, Glendale and Cincinnati Traction Company, filed in this office on the 22nd day of January, A. D. 1901, and recorded in Volume 68, Page 159 of the Records of Incorporations, and of the certificate of subscription of said company, filed in this office on the 24th day of January, A. D. 1901, and recorded in Volume 84, Page 245 of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 4th day of June, A. D. 1914.

CHAS. H. GRAVES,
Secretary of State.

[The Seal of the Secretary of State of Ohio.]

[Endorsed:] Articles of Incorporation of The Hamilton, Glendale and Cincinnati Traction Company. E. No. 2.

141 This Joint Agreement, made this 27th day of August, 1902, by and between the Directors of The Millcreek Valley Street Railroad Company, of which company the following are the Directors: H. H. Hoffman, (President), Cincinnati, Ohio; Bayard L. Kilgour, (Vice-President), Cincinnati, Ohio; C. H. Kilgour, Cincinnati, Ohio; Henry Burkhold, (Secretary and Treasurer), Cincinnati, Ohio; A. J. Becht, (Assistant Secretary and Treasurer), Cincinnati, Ohio; Francis T. Homer, Baltimore, Maryland; O. B. Brown, Dayton, Ohio; and the Directors of The Hamilton, Glendale and Cincinnati Traction Company, of which company the following are the directors: H. H. Hoffman, (President), Cincinnati, Ohio; Bayard L. Kilgour, (Vice-President), Cincinnati, Ohio; C. H. Kilgour, Cincinnati, Ohio; Henry Burkhold, (Secretary and Treasurer), Cincinnati, Ohio; A. J. Becht, (Assistant Secretary and

Treasurer), Cincinnati Ohio; Francis T. Homer, Baltimore, Maryland; O. B. Brown, Dayton, Ohio, Witnesseth:

The Directors of said companies hereby agree to the consolidation of the said two companies, subject to the confirmation thereof to be submitted to the stockholders of said respective companies, upon the following terms, to-wit:

The name of said consolidated company shall be The Cincinnati and Hamilton Traction Company, the number of directors of said company shall be seven, the place of residence of six of said directors shall be within the State of Ohio and the place of residence of the seventh director may be outside of the State of Ohio. The officers of said new company shall be a president, a vice-president, secretary and treasurer (which may be held by the same person) and assistant secretary and treasurer. The names and places of residence of the

142 directors of said company and of the offices held by said directors in said company shall be: H. H. Hoffman, (President), Cincinnati, Ohio; Bayard L. Kilgour, (Vice-President), Cincinnati, Ohio; C. H. Kilgour, Cincinnati, Ohio; Henry Burkhold, (Secretary and Treasurer), Cincinnati, Ohio; A. J. Becht, (Assistant Secretary and Treasurer), Cincinnati, Ohio; Francis T. Homer, Baltimore, Maryland; O. B. Brown, Dayton, Ohio, who are to hold office until the election therefor provided by law.

The capital stock of said new company, The Cincinnati and Hamilton Traction Company shall be two million two hundred thousand dollars (\$2,200,000.00), divided into twenty two thousand (22,000) shares of one hundred dollars (\$100.00) each, of which eleven hundred thousand dollars (\$1,100,000.00) shall be preferred stock similar in all respects to the preferred stock of The Millcreek Valley Street Railroad Company aforesaid, except that the annual dividend of five per cent cumulative payable semi-annually as provided in The Millcreek Valley Street Railroad Company's preferred stock shall be five per cent per annum cumulative, payable quarterly.

It is further agreed that the owners of the shares of the capital stock of each of said constituent companies may be converted into the capital stock of said new company upon the following basis:

Each share of the preferred stock of The Millcreek Valley Street Railroad Company shall be entitled to receive one share of the preferred stock of the said new company and each share of the common stock of The Millcreek Valley Street Railroad Company shall be entitled to receive one share of the common stock of the new company.

The owner of each share of the common stock of The Hamilton, Glendale and Cincinnati Traction Company, (the capital stock of said company being two hundred and fifty thousand dollars (\$250,000.00), divided into twenty five hundred (2500) shares of one hundred dollars (\$100.00) each, there being no preferred stock)

143 shall be entitled to receive one share of the preferred stock and eighty one-hundredths (80-100) of a share of the common stock of said new company; that is, for the entire capital stock of The Hamilton, Glendale and Cincinnati Traction Company, amounting to \$250,000.00 there shall be issued to the holders thereof \$250,-

000.00 of preferred and \$200,000.00 of common stock in the new company.

When this agreement is made and perfected as provided by law, the entire assets of said constituent companies shall become assets of the new company, and the liabilities of said constituent companies shall become liabilities of said new company.

It is further agreed, subject to the approval of the stockholders of said respective companies, (meetings for which purpose have been legally called by publication of notices and by copies thereof mailed to each of the stockholders of each of said respective companies, for Wednesday, August 27th, 1902, at the Franklin Bank, 122 East Third Street, Cincinnati, Ohio), that the agreement entered into by and between The Millcreek Valley Street Railroad Company and The Hamilton, Glendale and Cincinnati Traction Company by Owen Britt Brown and Bayard L. Kilgour as attorneys in fact for said companies, parties of the first part, and Randal Morgan of Philadelphia, Pennsylvania, party of the second part, for the purpose of leasing the entire railroad properties of said companies, upon the terms and conditions as stated in said preliminary agreement, which agreement is in the possession of said respective boards of directors and upon the minutes of the meetings of said boards, be and the same is hereby approved, and the directors and officers of said new company, to-wit: The Cincinnati and Hamilton Traction Company shall fully carry out said agreement.

In Witness Whereof we have hereunto set our names and
144 the corporate seals of said Companies on the date first above mentioned.

[CORPORATE SEAL.]

H. H. HOFFMAN,
B. L. KILGOUR,
C. H. KILGOUR,
HENRY BURKHOLD,
A. J. BECHT,
FRANCIS T. HOMER,
O. B. BROWN,

*Directors of The Millcreek Valley
Street Railroad Company.*

[CORPORATE SEAL.]

H. H. HOFFMAN,
B. L. KILGOUR,
C. H. KILGOUR,
HENRY BURKHOLD,
A. J. BECHT,
FRANCIS T. HOMER,
O. B. BROWN,

*Directors of The Hamilton, Glendale
and Cincinnati Traction Company.*

145 Office of the Millcreek Valley Street Railroad Company.

CINCINNATI, OHIO, August 27th, 1902.

STATE OF OHIO,

County of Hamilton, ss:

I, Henry Burkhold, Secretary of The Millcreek Valley Street Railroad Company, do hereby certify that at a meeting of the stockholders of said company, held at the office of the company at the Franklin Bank, 122 East Third Street, Cincinnati, Ohio, on the 27th day of August, 1902, due notice of the time and place of holding said meeting and of the business to come before the same, having been given by written notices addressed to each of the persons in whose names the capital stock of said company then stood and now stands, and also by a like notice published in The Commercial Tribune and The Cincinnati Enquirer, newspapers published in the City of Cincinnati, where the said company has its principal offices or place of business, at which meeting the stockholders of said company were present, in person or by proxy, the foregoing agreement of consolidation was submitted for consideration, and a vote by ballot was taken for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote, and that said agreement was adopted by 14,948 shares of the stock of said company being cast in favor of said adoption and 50 shares being cast in favor of said rejection, the votes cast in favor of the adoption of said agreement being more than two-thirds of the capital stock subscribed of said company.

In Witness Whereof, I have hereunto set my hand, and affixed the corporate seal of said company, this 27th day of August, A. D. 1902.

HENRY BURKHOLD,

[CORPORATE SEAL.]

*Secretary of the Millcreek Valley
Street Railroad Company.*

146 Office of the Hamilton, Glendale and Cincinnati Traction Company.

CINCINNATI, OHIO, August 27th, 1902.

STATE OF OHIO,

County of Hamilton, ss:

I, Henry Burkhold, Secretary of The Hamilton, Glendale, and Cincinnati Traction Company, do hereby certify that at a meeting of the stockholders of said company, held at the office of the company at the Franklin Bank, 122 East Third Street, Cincinnati, Ohio, on the 27th day of August, 1902, due notice of the time and place of holding said meeting and of the business to come before the same, having been given by written notices addressed to each of the persons in whose names the capital stock of said company then stood and now stands, and also by a like notice published in The Commercial Tribune and The Cincinnati Enquirer, newspapers published in the City of Cincinnati, where the said company has its principal office or place of business, at which meeting the stockholders of said company were present, in person or by proxy, the foregoing agreement

of consolidation was submitted for consideration, and a vote by ballot was taken for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote, and that said agreement was adopted by 2140 shares of the stock of said company being cast in favor of said adoption and — shares being cast in favor of said rejection, the votes cast in favor of the adoption of said agreement being more than two-thirds of the capital stock subscribed of said company.

In Witness Whereof, I have hereunto set my hand, and affixed the corporate seal of said company, this 27th day of August, A. D. 1902.

HENRY BURKHOLD,

[CORPORATE SEAL.]

*Secretary of the Hamilton,
Glendale and Cincinnati Traction Company.*

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UNITED STATES OF AMERICA.

STATE OF OHIO,

Office of the Secretary of State:

I, Lewis C. Laylin, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Agreement of Consolidation of The Millcreek Valley Street Railroad Company and The Hamilton, Glendale and Cincinnati Traction Company, forming "The Cincinnati and Hamilton Traction Company," filed in this office on the 28th day of August, A. D. 1902, and recorded in Volume 93, Page 156, of the Records of Incorporations.

Witness my hand and Official Seal, at Columbus, this 28th day of August, A. D. 1902.

[The Seal of the Secretary of State of Ohio.]

LEWIS C. LAYLIN,

Secretary of State.

147a [Endorsed:] Joint Agreement of Consolidation Millcreek Valley Street Railroad Company and Hamilton, Glendale & Cincinnati Traction Company. Ex. No. 3.

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Ex. No. 4.

Lease.

The Cincinnati and Hamilton Traction Company
to

The Cincinnati Interurban Company.

Dated September 30, 1902.

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This Indenture, made this 30th day of September, one thousand nine hundred and two, between The Cincinnati

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and Hamilton Traction Company, party of the first part (hereinafter called the Lessor), its successors and assigns, and The Cincinnati Interurban Company, party of the second part (hereinafter called the Lessee), for itself, its successors and assigns, witnesseth:

Whereas, the Lessor is a corporation duly organized, created and existing under the laws of the State of Ohio, with certain franchises, rights, privileges and powers, including inter alia the right to lay, construct, maintain, operate, own and lease a street railroad, or railroads operated as a street railroad, with all necessary turn-outs, side-tracks and switches, using the overheard trolley system, or other motive power system, having Cincinnati, Hamilton County, Ohio, and Hamilton, Butler County, Ohio, as its termini, and running over and along the Carthage turnpike and rights of way in said counties, and through the Villages of St. Bernard, Elmwood, Carthage, Hartwell, Lockland, Wyoming and Glendale, in Hamilton County, with power to let the same upon such terms and conditions as may be agreed upon between it and the Lessee; and,

Whereas, the Lessee is a corporation duly organized, created and existing under the laws of the State of Ohio, for street railroad purposes, and has power to lease any street railroad or street railroads or railroad operated as a street railroad, together with all the property, real, personal and mixed, and all the franchises, rights and privileges respecting the use and operation of such railroad or railroads upon such terms and conditions as may be agreed upon between it and the Lessor; and,

Whereas, the Lessee has offered to lease the railroads and all the property, real, personal and mixed, and all the franchises, rights and privileges respecting the use and operation of such railroads as are now or hereafter may be owned or operated or constructed or held by the Lessor, and which have been or may hereafter be acquired, leased or controlled by the Lessor, including inter alia those routes or lines of street railroad formerly known as The Milcreek Valley Street Railroad and The Hamilton, Glendale and Cincinnati Traction Company's railroad, upon the terms and conditions hereinafter stated, which offer has been approved and assented to by more than two-thirds of the stockholders of said Lessee Company at a special meeting called and assembled for that purpose in pursuance of the Acts of the General Assembly for such cases made and provided, at which meeting this lease was read and the officers of the Lessee were authorized and directed to execute and deliver the same; and,

Whereas, the said offer of the Lessee has been duly accepted by the Lessor, and said acceptance has been approved and assented to by more than two-thirds of the stockholders of said Lessor Company at a special meeting called and assembled for that purpose in pursuance of the Acts of the General Assembly for such cases made and provided, at which meeting this lease was read and the officers of the Lessor were authorized and directed to execute and deliver the same;

Now, therefore, this Indenture witnesseth: That for and in consideration of the rents to be paid and of the covenants and agree-

ments on the part and in behalf of the Lessee to be by it kept and performed as hereinafter mentioned, the Lessor has granted, demised and let, and by these presents does grant, demise and let unto the Lessee, its successors and assigns, all its street railroads, and all its property, real, personal and mixed, and all its franchises, rights and privileges respecting the use and operation of said railroads wheresoever situated, including the grants, franchises, rights and privileges along the routes or lines of railway from the City of Cincinnati, Hamilton County, Ohio, to the City of Hamilton, Butler County, Ohio, along the Carthage Turnpike and rights of way in Hamilton and Butler Counties and through the villages of St. Bernard, Elmwood, Carthage, Hartwell, Wyoming, Lockland and

Glendale, made to The Millcreek Valley Street Railroad
151 Company or to The Hamilton, Glendale and Cincinnati

Traction Company or their successors in title by the Commissioners of Hamilton County, and the Commissioners of Butler County, and the councils of the towns and villages through which the routes or lines of railway formerly owned by the two companies last above mentioned run, and such property, real, personal and mixed, and such rights, privileges and franchises as have been obtained, leased or otherwise acquired or controlled by said two last mentioned companies under contracts made by them or either of them with any other corporation or corporations organized for street railroad purposes, or any other corporations, municipal or private, or any county or political subdivision of the State of Ohio, or any individual or association whatsoever; all of which property, rights, franchises and privileges are now owned or claimed to be owned by the Lessor; and all other property, real, personal and mixed, and all franchises, rights, privileges, powers, contracts and agreements now owned by the said Lessor or which may hereafter be acquired, owned or controlled; said street railroads and property, and said franchises, rights, privileges and powers being all held and enjoyed in the counties of Hamilton and Butler, in the State of Ohio; and the Lessor does agree that this lease shall apply also to all other property, real, personal and mixed, franchises, rights and privileges respecting the use and operation of railroads which may be hereafter acquired in Hamilton and Butler Counties or elsewhere by the Lessor; or any in which the Lessor may hereafter obtain any interest during the continuance of this lease; except, however, all books, files, papers and records of the Lessor, all cash on hand and all indebtedness to the Lessor at the date of this lease and of the delivery of the property aforesaid into the possession of the Lessee; and the Lessor does agree that this lease shall apply also to all other property, real, personal and mixed, franchises, rights and privileges respecting the use and operation of railroads which may be hereafter acquired by Lessor or in which the Lessor may hereafter obtain any interest or title during the continuance of this lease;

To have and to hold the same unto the Lessee, its successors and assigns, for and during the unexpired term of the present
152 grants of franchises made by the County Commissioners
of Hamilton County, the County Commissioners of But-

ler County, the councils of the villages of St. Bernard, Elmwood, Carthage, Hartwell, Wyoming, Lockland, Glendale and Hamilton, or other municipal or county authorities, to The Millcreek Valley Street Railroad Company, or The Hamilton, Glendale and Cincinnati Traction Company, or their predecessors in title, now owned or claimed to be owned by the Lessor, or made to the Lessee, and thereafter for and during each and all successive renewals thereof or further extension in time, no matter in what form made, which may from time to time be made, which the Lessee shall accept, or the arbitrators, as hereinafter provided, may decide that the Lessee ought to accept, beginning on the first day of October, 1902; it being understood by the parties hereto that the use of the words "unexpired term" herein shall be taken to apply to the first franchise expiring, and thereafter to each franchise as it expires, upon the terms and conditions and for the consideration hereinafter provided and agreed to by the parties hereto, which terms and conditions and consideration are as follows:

First. The Lessee shall pay to the Lessor at the Lessor's office in Cincinnati, annual rental, payable in gold coin of the United States of America of the present standard of weight and fineness as follows, viz: for the first year beginning with the date of the delivery of possession of the property aforesaid to the Lessee, the first day of October, 1902, Fifty-five thousand dollars (\$55,000) per annum, payable one-quarter on the 31st. day of December, 1902, one-quarter on the 31st. day of March, 1903, one-quarter on the 30th. day of June, 1903, and one-quarter on the 30th. day of September, 1903;

For the second year, beginning with the expiration of the year last aforesaid, Sixty thousand five hundred dollars (\$60,500) per annum, payable quarterly on the days and months corresponding to the dates for the payments to be made during the first year as above set forth;

For the third year, beginning with the expiration of the year last aforesaid, Sixty-six thousand dollars (\$66,000) per annum, payable quarterly as aforesaid.

For the fourth year beginning with the expiration of the
153 year last aforesaid, Seventy-one thousand five hundred dollars (\$71,500) per annum, payable quarterly as aforesaid;

For the fifth year, beginning with the expiration of the year last aforesaid, Seventy-seven thousand dollars (\$77,000) per annum payable quarterly as aforesaid;

For the sixth year, beginning with the expiration of the year last aforesaid, Seventy-seven thousand dollars (\$77,000) per annum, payable quarterly as aforesaid;

For the seventh year, beginning with the expiration of the year last aforesaid, Eighty-two thousand five hundred dollars (\$82,500) per annum, payable quarterly as aforesaid.

For the eighth year, beginning with the expiration of the year last aforesaid, Eighty-two thousand five hundred dollars (\$82,500) per annum, payable quarterly as aforesaid;

For the ninth year, beginning with the expiration of the year

last aforesaid, Eighty-eight thousand dollars (\$88,000) per annum, payable quarterly as aforesaid;

For the tenth year, beginning with the expiration of the year last aforesaid, Ninety-three thousand five hundred dollars (\$93,500) per annum, payable quarterly as aforesaid;

For the eleventh year, beginning with the expiration of the year last aforesaid, Ninety-nine thousand dollars (\$99,000) per annum, payable quarterly as aforesaid.

For the twelfth year, beginning with the expiration of the year last aforesaid, Ninety-nine thousand dollars (\$99,000) per annum, payable quarterly as aforesaid;

For the thirteenth year, beginning with the expiration of the year last aforesaid, Ninety-nine thousand dollars (\$99,000) per annum, payable quarterly as aforesaid, and thereafter during the term of this lease or any renewal or renewals thereof one hundred thousand dollars (\$100,000) per annum, payable quarterly each year on the days above mentioned, to wit: the 31st. day of December, the 31st. day of March, the 30th. day of June, and the 30th. day of September.

The installments of rentals so reserved and the damages resulting from breaches of any of the covenants contained herein, to become and remain a debt and obligation of the Lessee, its successors and assigns, for which any stockholder shall be under any statutory liability only from and after such installments respectively

become due and payable according to the provisions hereof, 154 and from and after the happening of such breaches, the intention being to waive the statutory liability of stockholders for any such installments that may become due, and any such breaches as may occur after they have ceased to be stockholders.

And to secure the prompt payment in full of all the rentals herein reserved, and the performance of all the covenants contained in this lease to be kept and performed by the Lessee, a first lien, paramount to all other liens is hereby reserved upon all rights, interests, term, property, and assets of the Lessee at any time held under this instrument; and to the end that this lien may be effective, the Lessee covenants and agrees that none of its materials, machinery, rolling stock, equipment, or other property acquired and used for or in the operation of the leased premises, shall be so acquired as to permit or create a lien thereon or upon any part thereof prior or paramount to the lien herein reserved to the Lessor, subject only to the statutory liens in favor of mechanics and material-men, but the Lessee shall nevertheless pay and discharge such liens; provided, that nothing herein contained shall be taken to prevent an acquisition by the Lessee of rolling stock, equipment or other personal property (in excess of the rolling stock, equipment, and other personal property, or the equivalent thereof, either in kind or amount and value, as delivered under this lease) under arrangements or contracts securing a lien by the vendor thereof; but in case of such an acquisition, subject to such vendor's lien, it shall be the duty of the Lessee to make payment in a reasonable and

proper time for such property so acquired; and provided further, that nothing herein contained shall prevent the sale or other disposition by the Lessee of any real or personal property acquired under this lease, or held hereunder, whenever in the ordinary course of business it shall be deemed proper to sell or dispose of the same, it being the duty, however, of the Lessee in case of such sale or disposition to make replacement, by absolute title, of the property so sold or disposed of by other property useful in the business of at least like value; except, however, that the Lessor's consent shall be obtained before any sale is made of the power house and car barn at Hartwell.

The Lessee also agrees to pay the sum of six hundred dollars (\$600) per annum, payable by the Lessee quarterly at the said office of said Lessor on the same quarterly dates as aforesaid, for the maintenance of the Lessor's organization and the expenses of conducting the business of the Lessor during the continuance of this lease, or any renewal, or renewals thereof.

The Lessor agrees that the annual rentals received by it, other than the six hundred dollars per annum for expenses of the Lessor as above mentioned, shall all be applied, as received, to the payment, first, of the dividends and accumulated dividends on the preferred stock of the Lessor, and, second, of dividends upon the common stock of the Lessor, and the Lessor agrees that neither its preferred nor its common stock shall be at any time during the continuance of this lease or any renewal or renewals thereof, increased beyond the amount specified in this agreement of lease as herein-after set forth.

Second. The Lessee shall pay, satisfy and discharge, as the same shall accrue and become payable, all taxes, assessments, percentages on earnings, car-license fees and also all annual or other sums due to counties or municipal corporations under the terms of any franchise or grant held by the Lessor, and charges of every kind whatsoever that shall or may be lawfully assessed, laid or imposed by any power or authority whatsoever from and after the date of this lease during the said term, or any renewal or renewals thereof, upon the said Lessor or upon the property, franchises, rights and privileges, earnings or business of the said Lessor, which the said Lessor would have been liable to pay if this lease had not been made; provided, that all taxes and charges of every kind which shall accrue up to the date of delivery of the property demised to the Lessee, including any excise tax that may be due and payable upon gross receipts up to the first day of October, 1902, and the half year's taxes due and payable in December, 1902, shall be paid by the Lessor.

And the Lessee shall assume, pay and discharge all obligations of the Lessor under any and all subsisting contracts for supplies of any and every kind delivered after the execution of this lease. Said Lessee shall assume and discharge all leases under which the Lessor is obligated, and shall pay all rentals for which the
 156 Lessor is liable, either under its street railway grants or otherwise, and this provision shall apply to all leases which

the Lessor shall hereafter enter into at the instance and upon the request of the Lessee. Said Lessee shall, on and after October 1st., 1902, observe and carry out any contracts which the Lessor has made of or in respect to property under its control or in the operation of its road, and the Lessee shall be entitled to receive the rents and profits arising therefrom; provided, that the performance of any contract or contracts providing for the operation of cars in the City of Cincinnati may be waived by the Lessee in behalf of the Lessor during the continuance of this lease; and provided further, that the Lessee shall not become liable upon any subsisting contract for supplies or upon any other contracts or obligations of whatever character, except only such as are listed to said Lessee in a schedule to be furnished by the Lessor at the time of the execution of this lease.

Third. The Lessee shall, on the delivery of this lease, take possession of all the leased property, and shall operate the same at its own cost and expense, collecting and receiving for its sole use and benefit, all the income, rent, revenue and profits thereof.

Fourth. The Lessee, at its own risk and expense, and in its own corporate name, shall work and operate said lines of road, and each of them, maintain and keep in good order and repair, and renew and replace said lines, and each of them, and their rolling stock, equipment and appendages, respectively, and all the necessary power houses, car and repair shops, machinery and tools of the Lessee, supply additional rolling stock, and maintain and conserve the said street railway plant entire, make any and all changes, and do and perform all other things necessary to make and maintain said plant as a first class street railroad, according as public convenience and the terms of the several grants to the Lessor or its predecessors in title may require; and save the Lessor harmless from the payment of any claim, debts or liabilities whatsoever growing out of the working, maintaining or operating said leased property entire during the terms of this lease or any renewal or renewals thereof or growing out of any fault or neglect of

157 the Lessee, or its agents or employees, or their violation of any law or municipal ordinance now existing or hereafter lawfully passed; the Lessee taking upon itself the same duties, obligations and liabilities in respect of such leased lines of road and leased property entire and their appendages and appurtenances, and the working, maintaining and operation of the same, as if the Lessee, by succession, had become the corporate owner; and said Lessee shall hold the Lessor harmless from all liability, cost or expense arising, during the term hereby created, upon the bonds heretofore or hereafter executed to any county or municipal corporation conditioned for the faithful performance of the obligations of the Lessor under the several grants from said county or municipal corporations.

The Lessee shall at its own expense make all extensions, alterations, improvements, renewals, changes and replacements, to plant, equipment, trackage, paving, etc., necessary to meet the requirements of the business, and to satisfy the obligations of the Lessor

and to increase or change the power whenever necessary to the proper maintenance of the plant as a modern and efficient street railway system; and, in the event of this lease being terminated through any fault or omission of the Lessee, all additions and improvements made by it, and all franchises, rights and privileges obtained by it, together with the entire leased property, shall be surrendered to the Lessor without charge against or cost to said Lessor.

Fifth. Said Lessee shall at his own expense defend all actions of every kind that shall or may be brought against it on account of or in connection with its possession or operation of the leased property or any part thereof. It shall also indemnify and save harmless the said Lessor from all causes of action legal or equitable, and claims or demands, court costs, counsel fees, and other like reasonable expenses which may arise against or be incurred by the said Lessor, or which may arise against the said Lessee in the exercise by the Lessee of its powers under this lease and during the continuance and any renewal or renewals thereof.

Sixth. The Lessor hereby agrees, at its own expense, 158 to defend and protect itself in respect of all causes now pending and all causes of action arising prior to the delivery of possession of the property demised by this lease, and the prosecution of all appeals or petitions in error therefrom; and the Lessor further agrees at its own expense to prosecute all suits heretofore brought by it and now pending, and all appeals and errors therefrom, and all actions heretofore arising and now existing in its favor, and shall have and retain all benefits and recoveries in said suits, except only such as may embrace any of the property, rights or franchises hereby leased; and the Lessor further agrees where necessary to join in all actions prosecuted or defended for the protection of the demised property and the enjoyment of the same by the Lessee. In consideration of the covenants on the part of the Lessor contained in this article, the Lessee hereby agrees to pay to Lessor at its office, in addition to all other sums herein required to be paid, and upon the execution and delivery of this lease and the delivery of the demised property, the sum of ten thousand dollars (\$10,000) in cash.

Seventh. The Lessee shall cause the leased property to be insured in Lessee's name, and kept insured against fire, to the full extent usual and customary among street railroad companies, in good and reputable insurance companies (a list of the policies to be furnished to the Lessor), and the proceeds of any such insurance policies shall, as and when received by the Lessee, be placed and kept in a separate fund which shall be applied by the Lessee solely to the purpose of rebuilding and replacement of the property destroyed or damaged wherever necessary for the operation of the leased property, and where not so necessary then to extensions, betterments and renewals of the leased property. And in consideration of the provision thus made respecting the insurance, it is agreed that this lease shall continue notwithstanding the destruction or injury by fire or other unavoidable accident of the demised prop-

erty or any part thereof, anything in the statutes of Ohio or otherwise to the contrary notwithstanding.

Eighth. The Lessor and Lessee shall do all lawful acts and things necessary to preserve intact and fully protect the property, 159 real, personal and mixed, franchises, rights and privileges hereby demised, the Lessee agreeing to construct extensions and new lines, and all like matters, according as the public demands and its corporate and financial interests may require. And the Lessor shall, without cost or expense to it, at all times hereafter, when requested by the Lessee, make applications for additions to, and extensions of its lines and routes and renewals, extensions and enlargements of rights, privileges and franchises, and execute all necessary papers in that behalf; the Lessor on request of the Lessee shall permit the use of its, Lessor's name, in any proceeding, legal or equitable, in eminent domain or otherwise, which may be necessary to the protection or enlargement of the Lessee's interest in the street railway system hereby leased; and all additional or extended and renewed rights, privileges and franchises obtained in the name of the Lessor, as aforesaid, shall be treated as part of the leased property and be subject to all the terms and conditions and provisions of this lease, the same as if such had been vested in the Lessor at the date of this lease. Should any of the property of any kind or character covered by this lease be appropriated by any authority clothed with the power of eminent domain, the moneys derived therefrom shall be applied to the betterment or enlargement of the property hereby leased, and the Lessee shall seasonably notify the Lessor of such application and the rental shall not there be diminished.

Ninth. The Lessor covenants that its capital stock consists of eleven thousand shares of the par value of one hundred dollars each of five per cent cumulative preferred stock, and eleven thousand shares of the par value of one hundred dollars each of common stock, all of which is fully paid; and the Lessor further covenants that the dividends upon its preferred stock shall not be increased during the continuance of this lease or any renewal or renewals thereof, and that no mortgage or bonds will be issued by it upon any of the property subject to this lease during said period.

Tenth. The Lessee covenants and agrees to expend not less than 160 the sum of one hundred thousand dollars during the first year of this lease upon extensions, improvements, betterments and replacements of the demised property, and during the second and third years thereof said Lessee agrees to expend an additional sum of not less than one hundred thousand dollars for that purpose. In consideration of said expenditures the Lessor agrees, in addition to other covenants contained herein, to secure from its stockholders and to deliver to the Lessee, for the Lessee's own use and benefit, one hundred thousand dollars (face value) of the Lessor's common stock, issued and full paid, which said amount of stock shall be deposited by the Lessee with the Central Trust and Safe Deposit Company of Cincinnati, which Trust Company shall retain possession thereof until the sum of two hundred thousand dollars above stipulated has been expended upon the leased property

by the Lessee; whereupon said Trust Company shall deliver the same to the Lessee or its order. The said delivery by the Trust Company shall be made upon issue to it by the Lessee of a statement properly verified by the officers of the Lessee Company, evidencing the fact that the Lessee has expended for the purposes above enumerated the amount required, a copy of which statement shall be furnished to the Lessor Company, which shall be given ten days in which to make any corrections or call attention to any error therein.

Eleventh. The Lessor covenants that it owns and possesses all the assets owned by The Millcreek Valley Street Railroad Company and The Hamilton, Glendale and Cincinnati Traction Company at the time of the consolidation of the said two companies into the Lessor Company, and that it has become legally vested with all the rights, privileges, powers, franchises and contract rights then owned by each of the said companies; that its title to all the property, real, personal and mixed, and to the railroads, rights of way, agreements, franchises, powers and privileges hereby leased or intended so to be, is unincumbered and free and clear of all debts, claims, liabilities and liens of every kind and description. The Lessor further covenants that it, the said Lessor, is free and clear of all debts, claims and liabilities, except current operating expenses and taxes for the year 1902, and suits pending and judgements against
161 it, and that Lessor will pay and discharge all and singular its liabilities of every kind and description, except as otherwise provided in this lease, including all existing actions and rights of action; and in case any of the rights, privileges or franchises of the Lessor shall be, become, or be held to be, invalid, or in case acceptable renewals of the same cannot be obtained, resulting in either event in preventing the continued operation of a through line of railroad as hereby leased, from the City of Cincinnati to the City of Hamilton, Ohio, then and in such event the Lessee shall have the right to surrender this lease and to be reimbursed for all expenditures made by it on said property in the manner provided in article twelfth hereof.

Twelfth. In case renewal or further extension of time, no matter in what form made, of any of the franchises or grants of the Lessor from the counties and municipal corporations through which its line of railroad extends, cannot be obtained at the expiration of the present franchises or grants, or in case this lease shall be terminated before the time herein fixed for such termination through no cause arising from the default, neglect, or omission, or improper conduct of the Lessee, then and in that event the Lessee shall be paid by the Lessor for such additions to the demised property as it shall have constructed, whether by way of extensions, new lines, betterments or otherwise, according to their values at that time as a part of the whole of the leased property, real, personal and mixed; such values shall be ascertained and fixed by the award of arbitrators hereinafter provided for, and the award of such arbitrators or a majority of them shall be final and binding upon the parties hereto, and the same may be put into judgment at the option of either of the parties and enforced accordingly. For the

purpose of carrying into effect the provisions of this article, the Lessor and Lessee shall simultaneously, with the execution of this lease, each appoint a proper person to make an inventory of the entire property covered by this lease, a copy of which inventory shall be deposited with the Lessor and the Lessee respectively, and at the termination of this lease, for any of the causes aforesaid in this article, an inventory of the property shall be made by persons selected in the same way, and in the event of such persons disagreeing as to any of such property, they shall select a third person, and a decision of the majority of them shall be final for the purpose of ascertaining what if any additions have been made, and shall then exist for the purpose of valuation as aforesaid. But nothing which is furnished by the Lessee by way of renewal or substitution for any of the property hereby leased shall be construed to be an addition, save to such extent as the addition shall at the time of the termination of the lease as above mentioned possess a value in excess of the original cost of the matter for which the same was substituted or furnished by way of renewal or substitution.

In case renewals or extensions in time of the Lessor's grants as aforesaid shall be obtained, and the Lessee shall accept, or the arbitrators hereinafter provided for, who may be appointed for such purposes shall decide that the Lessee ought to accept, or in case of default on the part of the Lessee and of consequent forfeiture of its term for any reason provided in this lease, then and in any such event there shall be no inventory taken of the property, and all additions which would otherwise be the subject of valuation shall become the property of and belong to the Lessor, and shall be treated as part and parcel of the leased property without payment or compensation on the part of the Lessor.

Thirteenth. In case of and as often as default is made by the Lessee in the payment of any of the installments of quarterly rents herein reserved for the term of twenty (20) days after the same shall be due and payable, or on default by the Lessee for a reasonable period after the same or any part thereof shall become due and payable, and without demand, but after thirty (30) days' notice thereof to the Lessee to pay any of the taxes, assessments, percentages, or annual or other payments due any county or municipal corporation, or other charges, including rentals accruing against the Lessor, and hereinbefore required to be paid by the Lessee (provided that such "reasonable period" shall not exceed the time which would enable the public, through officials authorized to collect such moneys, or through any other officials, to sell or forfeit any of the leased property, franchises, rights or privileges, in consequence of such failure to pay any of the moneys so to be paid by the Lessee), or, on default by the Lessee for the

163 period of three (3) months after notice thereof, in writing, by the Lessor to do or perform any other covenant on its part to be done or performed under the provisions of this lease, then and in every such case the Lessor shall have the right, at its option, to enter upon and take possession of all the leasehold property, franchises, rights and privileges hereby demised, and all the additions,

real, personal and mixed, made to the property, and terminate and put an end to this lease.

If the Lessor shall in respect of any default, (except payments of money, as to which provision is made as above), at any time after said three months, allege a continuance of the default mentioned in such notice as ground for entering into possession and terminating this lease under such option, arbitrators shall be appointed in the manner and of the qualifications hereinafter provided, who shall determine whether the default alleged has taken place; and if they, or a majority, find such default, they shall so notify said Lessee, in writing, giving it at least twenty (20) days to correct the same, and if such correction shall not then be made, they shall also determine the time when possession of the property hereby demised shall be delivered to the Lessor, and when this lease and the rentals reserved shall terminate; such arbitrators shall also in such award settle, determine and award upon all damages, claims and demands between the parties hereto, growing out of the termination of this lease and the breaches thereof, and all other matters in difference between the respective parties; the intention hereof being that, as respects defaults in payment of moneys, either as rentals or as taxes, assessments, percentages or charges, as hereinbefore provided, such default shall entitle the Lessor, upon the expiration of the time fixed in respect to the payment thereof, and also as respects other defaults under and in pursuance of notices and awards as provided above, to take immediate possession of the demised property entire, and remove all persons therefrom, and from thenceforth to have, hold, possess and enjoy the same as of its first and former estate therein, and thereupon all the estate and interest of the said Lessee in and to the same shall absolutely
164 cease and determine, as if these presents had never been made.

Fourteenth. If any difference shall arise between the parties hereto relative to the construction of this lease, or the performance of any of the covenants hereof, except only the covenants for the payment of money, and in all cases in which the appointment of arbitrators is provided, the Lessor and Lessee shall each select one disinterested arbitrator of experience and skill in street railway construction or management, and the said arbitrators shall select another of like skill and experience, and the three so chosen shall hear and decide such differences, and their decision, or that of a majority of them, shall be final and conclusive upon the said parties; and in case either of the parties fail to appoint an arbitrator as aforesaid for the period of thirty (30) days after written notice to make such appointment, then and in that event the arbitrator appointed by the party not in default shall appoint an arbitrator for the defaulting party, and the said two arbitrators shall then select a third arbitrator as aforesaid; and in all cases of arbitration under this lease, the award of the arbitrators, or a majority of them, shall be final and binding upon the parties.

Fifteenth. At the end of said term, or at the sooner termination of this lease, the said Lessee, its successors and assigns, shall redeliver and surrender up to the Lessor, its successors and assigns, the said several subjects of this lease, or the property, real, per-

sonal and mixed, which shall then be subsisting in their place, and which shall at least be equal to that now leased, in as good order and condition as the same now are, and with such additions, alterations and improvements as shall have been made thereto, except as otherwise provided in this lease.

Sixteenth. The said Lessor shall and will, from time to time, and at all times hereafter, at the request of the said Lessee, make, execute and deliver all such other and further instruments and assurances in law for the further, better or more perfectly assuring these premises, according to the true intent and meaning of these presents, as the counsel of the Lessee shall advise to be reasonably necessary.

Seventeenth. Each and all of the preceding covenants, agreements and stipulations shall mutually bind, and enure to the benefit of the said Lessee and Lessor, their and each of their successors and assigns.

Eighteenth. The Lessee shall have the right at any time, subject to the provisions of this lease, to assign this lease, and all its rights thereunder, and all the title and estate thereby transferred in the leased property, real, personal and mixed, franchises, rights and privileges, together with any other leaseholds it may hereafter acquire, to any corporation competent to receive such assignment, and of equal financial responsibility with the Lessee. Thereafter, if the assignee corporation shall file with the Lessor its agreement of acceptance of this lease and of all the obligations undertaken by the original Lessee in this lease, the original Lessee shall thereupon be ipso facto released from all obligations assumed by it under this instrument, and such assignee substituted in its place with the same effect as if it were the original contracting party.

Nineteenth. And said Lessor, for itself and for its successors and assigns, does hereby covenant and agree to and with the said Lessee, its successors and assigns, that upon the payment of the rents and the performance of all and singular the covenants aforesaid, said Lessee shall and may peaceably and quietly have and enjoy the aforesaid premises with the appurtenances for and during the term aforesaid, free from any let or hindrance by said Lessor, its successors or assigns, or any other person or persons whatever claiming through or under it.

In Witness Whereof, the parties hereto have, by their respective presidents and secretaries duly authorized in the premises, caused to be hereunto affixed their corporate names and seals and the names of their respective presidents and secretaries, the day and year first above written.

THE CINCINNATI AND HAMILTON
TRACTION COMPANY,

[SEAL.]

By H. H. HOFFMAN, *President*.

Attest:

HENRY BURKHOLD, *Secretary*.

THE CINCINNATI INTERURBAN
COMPANY,

By GEORGE H. WARRINGTON, *President*.

[SEAL.]

S. C. COOPER, *Secretary*.

In presence of
WALLACE BURCH.
WADE H. ELLIS.

167 STATE OF OHIO,
County of Hamilton, ss:

Be it remembered, That on the 30th. day of September, 1902, before the subscriber, a notary public in and for said county and state, personally appeared The Cincinnati and Hamilton Traction Company, by H. H. Hoffman, president, to me known, who, being by me duly sworn, did depose and say that he is the president of The Cincinnati and Hamilton Traction Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; that he signed his name thereto by like order; and that the execution of the foregoing instrument was the free and voluntary act and deed of said company for the uses and purposes therein expressed and mentioned.

In Witness Whereof, I have hereunto set my hand and official seal, on the day and year last above written.

[SEAL.]

RANDOLPH MATTHEWS,
Notary Public, Hamilton County, Ohio.

168 STATE OF OHIO,
County of Hamilton, ss:

Be it remembered, That on this 30th. day of September, 1902, before me, the subscriber, a notary public in and for said county and state, personally appeared The Cincinnati Interurban Company, by George H. Warrington, president, to me known, who, being by me duly sworn, did depose and say that he is the president of The Cincinnati Interurban Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; that he signed his name thereto by like order; and that the execution of the foregoing instrument was the free and voluntary act and deed of said company for the uses and purposes therein expressed and mentioned.

In Witness Whereof, I have hereunto set my hand and official seal, on the day and year last above written.

[SEAL.]

RANDOLPH MATTHEWS,
Notary Public, Hamilton County, Ohio.

Comp. Ex. No. 4.

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No. 5.

These articles of incorporation of the Ohio Traction Company Witnesseth:

That, we, the undersigned, all of whom are citizens of the State

of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. That the name of said corporation shall be the Ohio Traction Company.

Second. Said corporation is to be located at Cincinnati, in Hamilton County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of leasing, purchasing, acquiring, owning, operating, maintaining, constructing, and building street, interurban and electric railroads, and extensions and branches thereof, for the carriage of passengers, express matter, freight and United States mail, in the Cities of Cincinnati, Hamilton County, Ohio, and Hamilton, Butler County, Ohio, having as its termini said cities of Cincinnati and Hamilton in said State, and operating and passing in and through said Counties of Hamilton and Butler in said State.

Fourth. The capital stock of said corporation, common and preferred, shall be Twenty million dollars (\$20,000,000.00) consisting of One hundred thousand (100,000) shares of common stock of the par value of One hundred dollars (\$100.00) each, and One hundred thousand (100,000) shares of preferred stock of the par value of One hundred dollars (\$100.00) each; the holders of the preferred stock shall be entitled to a dividend of five (5) per cent, per annum, payable quarterly, out of the surplus profits of the Company for each year in preference to all other stockholders, and such dividends shall be cumulative; upon the dissolution of the corporation for any reason, the holders of such preferred stock shall be entitled to be paid in full the par value thereof, before anything shall be paid to the holders of the common stock; the holders of such preferred stock shall have the same voting power at meetings of the company as the holders of the common stock.

In witness whereof: We have hereunto set our hands this twenty-second day of May A. D. 1905.

W. KESLEY SCHOEPF.

W. S. ROWE.

WM. COOPER PROCTOR.

BRIGGS S. CUNNINGHAM.

WILLIAM T. IRWIN.

170 THE STATE OF OHIO,
County of Hamilton, ss:

Personally appeared before me, the undersigned, a Notary Public, in and for said county, this twenty-second day of May A. D. 1905 the above named W. Kesley Schoepf, W. S. Rowe, William Cooper Proctor, Briggs S. Cunningham and William T. Irwin, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[SEAL.]

ALBERT W. SCHWARTZ,
Notary Public.

THE STATE OF OHIO,
County of Hamilton, ss:

I, Chas. Weidner Jr., Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that Albert W. Schwartz, whose name is subscribed to the foregoing acknowledgement as a Notary Public, was at the date thereof a Notary Public, in and for said County, duly commissioned and qualified and authorized as such to take said acknowledgement, and further, that I am well acquainted with his handwriting and believe that the signature to said acknowledgement is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Cincinnati, Ohio this 22nd day of May A. D. 1905.

[SEAL.]

CHAS. WEIDNER, JR.,
 By FRANK LEWIS,
Deputy Clerk.

UNITED STATES OF AMERICA,
State of Ohio, Office of the Secretary of State, ss:

I, Lewis C. Laylin, Secretary of State, of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of the Ohio Traction Company, filed in this office on the 22nd day of May, A. D. 1905, and recorded in volume 109, page 151, of the records of Incorporations.

Witness my hand and official seal at Columbus, Ohio, this 22nd day of May 1905.

LEWIS C. LAYLIN,
Secretary of State.

Comp. Ex. No. 5.

171 Assignment of Lease from The Cincinnati Interurban Co. to The Ohio Traction Co. Dated July 5, 1905. Received for Record, State of Ohio, Hamilton Co., July 7, 11:33 A. M., 1905. Recorded in Lease Book No. 132, page 20. Fred Bader, Recorder.

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COMP. EX. NO. 6.

Know all men by these presents, that the Cincinnati Interurban Company, a corporation under the laws of the State of Ohio, for and in consideration of the sum of One Dollar and other good and valuable consideration to it paid by The Ohio Traction Company, a corporation under the laws of the State of Ohio, the receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto the said The Ohio Traction Company, its successors and assigns, all the estate, right, title and interest of the grantor in and to a certain Indenture of Lease bearing date the

30th day of September, 1902, recorded in Lease Book 123, Page 496, of the records of Hamilton County, Ohio, made by The Cincinnati & Hamilton Traction Company, a corporation by consolidation under the laws of Ohio, to the said The Cincinnati Interurban Company, of a certain electric street railway operating between Cincinnati, Hamilton County, Ohio, and Hamilton, Butler County, Ohio, together with all the rights, privileges and franchises thereof; and also all cash on hand and other assets of every kind and nature of said The Cincinnati Interurban Company of July 1st, 1905.

To have and to hold the same unto the said The Ohio Traction Company, its successors and assigns, from the first day of July, 1905, together with all privileges and appurtenances, rents, issues and profits thereof, for and during all the rest, residue and remainder of the term mentioned in said Indenture of Lease; subject, nevertheless, to the rents, covenants, conditions and provisions therein contained; and subject, further, to all the liabilities of every kind and nature of said The Cincinnati Interurban Company.

In witness whereof, the said The Cincinnati Interurban Company, acting by its President and Secretary, has caused its corporate name and seal to be hereunto subscribed and affixed, on this 5th day of July, 1905.

THE CINCINNATI INTERURBAN
COMPANY,
By GEORGE H. WARRINGTON, *President*.

Attest:

[SEAL.] S. C. COOPER, *Secretary*.

Signed, sealed and acknowledged in presence of us:

DANA STEVENS,
CHAS. LAMBERT.

173 STATE OF OHIO,
Hamilton County, ss:

Be it remembered, that on this 5th day of July, in the year of our Lord one thousand nine hundred and five, before me the subscriber, a Notary Public, in and for said county, personally came The Cincinnati Interurban Company, a corporation, acting by George H. Warrington, its President and S. C. Cooper, its Secretary, thereunto duly authorized, the grantor in the foregoing deed, and acknowledged the signing and sealing thereof to be its and their voluntary act and deed.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

(S'g'd) DENIS J. DOWNING,
[SEAL.] *Notary Public in and for
Hamilton County, Ohio.*

D. J. Downing, Assistant Secretary of The Ohio Traction Company, hereby certifies that the foregoing is a true and correct copy

of the assignment of lease from The Cincinnati Interurban Company to The Ohio Traction Company dated July 5th, 1905.

In witness whereof, the said D. J. Downing has hereunto set his hand and corporate seal of The Ohio Traction Company this 12th day of August, 1913.

Assistant Secretary.

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No. 7.

The Supreme Court of Ohio.

No. 6737.

THE VILLAGE OF CARTHAGE et al., Plaintiffs in Error,
versus
THE MILL CREEK VALLEY STREET RAILROAD COMPANY, Defendant
in Error.

Error to the Circuit Court of Hamilton County, Ohio.

Inj. Allowed, Made Perpetual, pg. 20.

RECORD.

Samuel B. Hammel and John R. Saylor, Attorneys for Plaintiffs in Error.

E. W. Kittredge and John W. Warrington, Attorneys for Defendant in Error.

175 Entered July 1st, 1899.

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RECORD.

Petition in Error.

(Filed July 28, 1899.)

Supreme Court of Ohio.

No. 6737.

THE VILLAGE OF CARTHAGE, a Municipal Corporation under the Laws of Ohio; Uriah Zerfey, William E. French, Michael F. Molloy, F. P. Jackson, W. A. Ross, Charles F. Schwarm, Louis J. Helfrich, and J. L. Orbison. Plaintiffs in Error,

vs.

THE MILL CREEK VALLEY STREET RAILROAD COMPANY, a Corporation, Defendant in Error.

Plaintiffs in error, the Village of Carthage, a municipal corporation under the laws of Ohio, Uriah Zerfey, William E. French,

Michael F. Molloy, F. P. Jackson, W. A. Ross, Charles F. Schwarm, Louis J. Helfrich and J. L. Orbison, say, that at the January Term, 1899, of the Circuit Court of Hamilton County, the defendant in error, The Mill Creek Valley Street Railroad Company, a corporation, recovered a judgment and decree by the consideration of said court against the plaintiffs in error, in an action then pending therein, and numbered 3023 on the docket of said court, wherein the defendant in error was plaintiff and the plaintiffs in error were defendants; and the said plaintiffs in error file herewith a transcript of the docket and journal entries, the original papers and the bill of exceptions in said case and make them a part of this petition in error.

Plaintiffs in error say there is error in said record and proceedings prejudicial to plaintiffs in error, in this, to-wit:

1. Said court erred in overruling the motion of plaintiffs in error for a new trial.
- 180 2. Said court erred in admitting evidence offered by the defendant in error, to which the said plaintiffs in error objected.
3. Said court erred in excluding evidence offered by the plaintiffs in error.
4. Said judgment was given for said The Mill Creek Valley Street Railroad Company, when it ought to have been given for the plaintiffs in error.
5. Said judgment is not supported by the evidence.
6. Said judgment is contrary to law.
7. Said court erred in dismissing the cross-petition of plaintiffs in error.

Plaintiffs in error therefore pray that said judgment and decree may be reversed, and that they may be restored to all things they have lost by reason thereof.

SAMUEL B. HAMMEL AND

JOHN R. SAYLER,

Attorneys for Plaintiffs in Error.

Entry of Appearance.

Now comes the said defendant in error, The Mill Creek Valley Street Railroad Company, a corporation, by its attorneys of record, and waives the issuing and service of summons herein and voluntarily enters its appearance.

E. W. KITTREDGE,

JOHN W. WARRINGTON,

Attorneys for Defendant in Error.

Transcript of Docket and Journal Entries in Case No. 114,342, Common Pleas Court.

(Filed in Circuit Court March 22, 1899.)

To August 15th, 1898.—Petition filed August 4th, 1898. Action for injunction.

August 4, 1898.—Minute 266: Temporary restraining order allowed. Bond \$500.00.

Let a temporary restraining order issue as prayed for herein until further order of court enjoining the defendants and each of them from the carrying the resolution of August 2d, 1898, into effect, from interfering with or in any manner molesting plaintiff or any of its officers or agents in the quiet and peaceable enjoyment of its said railway property and from interfering with the plaintiff's use and operation of the same in the regular carriage of passengers
181 through the Village of Carthage or any part thereof, upon plaintiff giving a bond satisfactory to the clerk of the court in the sum of five hundred dollars.

August 4, 1898.—Bond 85, Book 16, in \$500.00 given (see safe).

August 4, 1898.—Summons issued, Endorsed: "Injunction allowed. Bond in \$500.00 given. Geo. B. Harte, Clerk, by Louis N. Reif, Deputy."

August 12, 1898.—Supplemental petition filed.

August 12, 1898.—Affidavit of John F. Powers filed.

August 12, 1898.—Minute 311: Entry allowing temporary restraining order on supplemental petition. Bond \$500.00.

Let temporary restraining order issue upon the supplemental petition of plaintiff herein, as prayed in said supplemental petition, against the defendants, in addition to the restraining order heretofore issued upon the original petition herein, enjoining and restraining the defendants and each of them, until August 19th, 1898, from interfering with the plaintiff, its officers and agents, in making such repairs upon the tracks and road bed and overhead appliances of and connected with the line of the plaintiff's road within the said Village of Carthage, as described in the petition herein, as may be requisite or necessary to restore and preserve said tracks, road bed and overhead appliances in good condition for the safe operation of the cars of the plaintiff over said line of road, for the transportation of passengers going to and from the approaching Carthage Fair and elsewhere, and said defendants and each of them are hereby temporarily enjoined, as above set forth, from interfering with or obstructing or molesting the said plaintiff, its officers or agents, in the making of such repairs as are above indicated. The said plaintiff in making such repairs to so prosecute them as not to interfere with the travel on said streets and roads in said Village of Carthage further than is unavoidable. This order to be in force to and including the 19th of August, 1898, upon the giving by the said plaintiff of an undertaking to the satisfaction of the clerk of this court conditioned according to law in the sum of \$500.00.

August 12, 1898.—Bond 86, Book 16, in \$500.00 given (see safe).

August 12, 1898.—Order of injunction issued.

August 15, 1898.—Summons returned: 1898, August 4th.
182 Served the within named defendants, the Village of Carthage, a municipal corporation under the laws of Ohio, by delivering a true copy of this writ with all the endorsements thereon personally to Wm. Wehe, Treasurer thereof, at 5:50 o'clock P. M., no other chief officer being found; also served Uriah Zerfey at 6:20 o'clock P. M., Michael F. Molloy at 6:10 P. M. and Louis J. Helfrich at 5:37 o'clock P. M., by delivering to each personally a true copy of this writ with all the endorsements thereon; also served William E. French at 6:45 o'clock P. M., F. P. Jackson at 6:01 o'clock P. M., W. A. Ross at 6:38 o'clock P. M., Chas. F. Schwarm at 6:35 o'clock P. M., and J. L. Orbison at 6:15 o'clock P. M., by leaving a true copy of this writ with all the endorsements thereon, at the usual place of residence of each. Chris. Reichel, Sheriff of Hamilton County, Ohio. By Robert Sweeny, Deputy. Sheriff's fees, \$9.40.

August 16, 1898.—Answer of defendants filed.

August 22, 1898.—Summons returned: 1898, August 12th. Served the within named defendant, the Village of Carthage, a municipal corporation under the laws of Ohio, by delivering a true copy of this writ, with all the endorsements thereon, personally to J. L. Orbison, Mayor of said Village at 2:10 o'clock P. M.; also served Uriah Zerfey at 2:35 o'clock P. M., William E. French, 2:05 o'clock P. M., F. P. Jackson, 12:25 o'clock P. M., W. A. Ross at 1:33 o'clock P. M., Louis J. Helfrich at 1:26 o'clock P. M., and J. L. Orbison at 2:10 o'clock P. M., by delivering to each personally a true copy of this writ with all the endorsements thereon; also served Michael F. Molloy at 1:44 o'clock P. M. and Charles F. Schwarm at 2:52 o'clock P. M., by delivering a true copy of this writ, with all the endorsements thereon, at the usual place of residence of each. Chris. Reichel, Sheriff of Hamilton County, Ohio. By Robert Sweeny, Deputy. Sheriff's fees, \$9.80.

August 25, 1898.—Affidavits in support of application filed.

August 25, 1898.—Affidavits resisting application, etc., filed.

August 26, 1898.—Minute 378: Report of John Harris filed by leave.

August 27, 1898.—Minute 382: Entry extending restraining order.

The temporary restraining order granted to plaintiff in this cause on August 12th, 1898, is hereby for good cause shown on the application of plaintiff extended for thirty days from and after
183 the date of this entry, the highway to be restored by plaintiff at its expense, wherever opened for such repairs.

August 31, 1898.—Minute 389: Entry continuing bond.

The bond and undertaking referred to in and given for the restraining order entered August 12th, 1898, herein, is hereby ordered to be and continue in full force and effect for the period and purpose of the extension of said temporary injunction, granted by order

dated August 27th, the same as if expressly so continued by said order of August 27th.

October 4, 1898.—Motion to dissolve restraining order filed.

October 6, 1898.—Affidavits of Hall, Hammel and Waddell filed.

October 31, 1898.—Amendment to petition filed.

October 31, 1898.—Minute 1027: Entry allowing fee of \$25.00 to referee to be taxed as part of costs.

The report of John Harris, as referee in this cause, having been heretofore made, it is now ordered that said John Harris be allowed a fee of twenty-five dollars (\$25.00) as such referee to be paid and taxed as part of the costs of this case.

November 7, 1898.—Answer to amendment to petition filed.

November 15, 1898.—Application for official stenographer filed.

November 15, 1898.—Security for official stenographer approved and filed.

November 15, 1898.—Minute 436: Order for services of Lida J. Bacon, official stenographer.

Upon application of the plaintiff and defendants the services of Lida J. Bacon, an official stenographer, are granted upon satisfactory security for the per diem fees of said stenographer in the above case being given, and Dennis Dwyer and R. S. Waddell being offered as security, the court approves of the same.

November 18, 1898.—Certificate given Lida J. Bacon official stenographer, for \$15.00.

December 8, 1898.—Minute 576: Amendment to answer to petition and supplemental petition and to answer to amendment to petition filed by leave.

January 3, 1899.—Certificate issued to F. Cook, official stenographer, for \$5.00.

184 February 2, 1899.—Motion for rehearing filed.

February 4, 1899.—Certificate issued to Lida Bacon, official stenographer, \$18.00.

February 10, 1899.—Reply filed.

March 14, 1899.—Minute 1132: Final decree. Plaintiff pay costs; plaintiff excepts, gives notice of appeal; bond fixed at \$250.00.

This cause coming on this day to be heard upon the pleadings, exhibits and files and the evidence, was argued by counsel and submitted to the court, and the court being fully advised in the premises finds the equities of the case with the defendants. The court further finds that the maintenance and operation by the plaintiff, of the street railway upon the Carthage pike, Main street and Lockland avenue, or either of them, in the Village of Carthage, is without authority of law. The court further finds that the maintenance of said railway, together with its tracks, rails, poles and wires, in said Carthage pike, Main street and Lockland avenue, or either of them, in said Village of Carthage, and the operation of said street railway therein, is a nuisance.

Wherefore, it is by the court considered, adjudged and decreed that the temporary injunctions heretofore granted against the defendants be and the same are hereby dissolved; that the petition, supplemental

petition and amendment to the petition be and they are hereby dismissed.

It is further by the court considered, adjudged and decreed that the plaintiff be, and it is, hereby perpetually enjoined from maintaining said street railway, tracks, rails, poles and wires, or any part thereof, in said Carthage pike, Main street and Lockland avenue, or either of them, in said Village of Carthage, and from operating said street railway in said Carthage pike, Main street and Lockland avenue, or either of them, in said Village of Carthage.

And it is further considered by the court that the defendants recover from the plaintiff their costs herein, taxed at \$—.

To all of which finding and judgment the plaintiff by its counsel excepts; and thereupon the plaintiff gave notice of its intention to appeal said cause to the Circuit Court, and the court fixed the bond for such appeal at \$250.

And upon application of the plaintiff, the operation of this decree is stayed for a period of thirty days to enable it to perfect its appeal. And now come the defendants and waive all right of
185 action on the bonds or either of them executed herein on the allowance of the temporary restraining orders.

March 20, 1899.—Bond, 61, Book 18, in \$250 given (see Safe.)
(Duly certified.)

Petition.

(Filed August 4, 1898.)

STATE OF OHIO:

Hamilton County Common Pleas Court.

No. 114,342.

THE MILL CREEK VALLEY STREET RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

THE VILLAGE OF CARTHAGE, a Municipal Corporation under the Laws of Ohio; Uriah Zerfey, William E. French, Michael F. Molloy, F. P. Jackson, W. A. Ross, Charles F. Schwarm, Louis J. Helfrich, and J. L. Orbison, Defendants.

Now comes the Mill Creek Valley Street Railroad Company and represents and avers that it is a corporation duly organized and existing under and according to the laws of the state of Ohio; that defendant, the Village of Carthage, is a municipal corporation under and according to the laws of said State; that Uriah Zerfey is the Marshal of said Village; that William E. French, Michael F. Molloy, F. P. Jackson, W. A. Ross, Louis J. Helfrich and Charles F. Schwarm compose the Council of said Village, and that J. L. Orbison is the Mayor of said Village.

Plaintiff further avers that its corporate name was formerly the

Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, and that the change from that name to the present one was made in pursuance of the statute for such cases provided, and due notice and certificate thereof have been properly given and filed.

Plaintiff further avers that it is the owner of and is engaged in operating the certain line of electric street railway situate in 186 the said county of Hamilton, commencing in the city of Cincinnati at the entrance to the Zoological Garden in Erkenbrecher avenue of said city, and extending thence along said avenue to the Carthage pike by double track; thence along said Carthage pike northwardly by double track to Lockland avenue in the Village of Carthage aforesaid; thence continuing along said avenue by double track in said Village to the north corporation line thereof, and thence continuing along the present line of said railway by double track through the Village of Hartwell and into the Village of Lockland; that said railway is equipped with cars and electric appliances, and motive power and is in daily operation for the carriage of passengers between the two termini before mentioned; and that said electric railway accommodates a large number of passengers daily, and any interference with any portion thereof, especially the portion in the Village of Carthage, would virtually destroy the usefulness and value of the railway.

Plaintiff further avers that the grant for the portion of said electric railway so located in Erkenbrecher avenue as aforesaid, was made by the owners of the property now embraced within the limits of said avenue, prior to its dedication to the public, and said avenue was dedicated and accepted subject to the grant so made; that the grant for the portion of said railway so located as aforesaid in the Carthage pike, was duly made in the first instance by the Board of Commissioners of Hamilton County, said board being then in the actual control, management and possession of said turnpike entire, under and according to the statutes of the state in that behalf enacted and provided, and especially under the certain act of the General Assembly of Ohio, entitled "An act to authorize the Commissioners of Hamilton County to improve the roads of said county upon conditions therein named," passed March 24, 1851; that said last mentioned grant by the Board of Commissioners aforesaid was, so far as concerns the portion of said Carthage pike which was then and still is within the corporate limits of said defendant, the Village of Carthage, made at the special instance and request of said Village by resolution passed by the Council thereof on or about January 29, 1889; that the grant for the portion of said electric railway which lies as aforesaid along Lockland avenue in said Village, was made by said Village by an ordinance passed by its Council on or about August 7, 1894, entitled "An ordinance to provide for 187 the extension of the Cincinnati Inclined Plane Railway from the northern terminus of the Carthage pike over Main street and Lockland avenue to the north corporation line of the Village of Carthage," said ordinance having provided not alone for the extension from the Carthage pike over Lockland avenue to the north corporation line, but also for the extension of the tracks of said rail-

way from the southerly corporation line of said Village along the Carthage pike, called Main street in said ordinance, to its intersection with said Lockland avenue, the said Cincinnati Inclined Plane Railway Company being then the owner of the electric railway in question herein, and having theretofore in fact and in pursuance of the previous legislation hereinbefore alluded to, constructed tracks in and along said Carthage pike as far north as said Lockland avenue; that the extension so authorized along the tracks then in operation in said Carthage pike within said Village was accepted and the extension so authorized by said ordinance of August 7, 1894, was accepted and constructed in and along said Lockland avenue from the Carthage pike to the north corporation limits of said Village under and in pursuance of said ordinance; that said electric railway entire was constructed and put into operation at great cost and expense to its owner, in and through said Village along the line before mentioned, shortly after the action taken as aforesaid by the Council of said Village by its resolution and ordinance aforesaid, passed January 29, 1899, and August 7, 1894, respectively, and upon the faith thereof, as well as upon the faith of the grant so made as before stated by the Board of Commissioners of Hamilton County; that said electric railway has been maintained and kept in operation ever since then at great cost and expense to its owner, upon the faith of all of said acts, with the acquiescence of the said Village and its Council, and officers except as hereinafter stated; and that all the owners of property abutting along the line of said railway between the termini hereinbefore mentioned, either actually consented to the construction and operation of said railway at or prior to the time the same was built, or have ever since acquiesced therein except as hereinafter stated.

Nevertheless, said plaintiff avers further, that on or about July 1, 1898, the Council of said defendant, the Village of Carthage, without authority of law and without the consent of the owner of said electric railway and in spite of its rights and interests therein and in violation of its grants and contracts as hereinbefore set out, 188 passed an ordinance which in terms repeals said ordinance of said Village dated August 7, 1894; that since then, to-wit, on or about the 2d day of August, 1898, the Council of said Village adopted a resolution which in terms requires the owner of said electric railway to take up and remove its tracks and electric appliances and supports from said Carthage pike and from said Lockland avenue within the corporate limits of said Village, and on the owner's failure to do so within ten days, instructs the Village Marshal, Uriah Zerfey, defendant herein, to take up and remove the same and charge the expense thereof to the owner of said railway; that said Village, through its Council and Marshal and the other defendants herein named, threatens to, and unless restrained by order of this court, will carry said resolution into execution by the tearing up and removal and destruction of all of plaintiff's tracks and electric motive power appliances and supports within said Village; that such conduct and action will, if permitted, cause this plaintiff great and irreparable injury by the destruction of the continuity of its railway, by the pre-

vention of the operation of said railway, and by the destruction of its railway property within the limits of said Village.

Plaintiff further avers that the only cause assigned or expressed for the passage of the so-called repealing ordinance aforesaid and of the resolution above mentioned, is the dissatisfaction on the part of certain individuals in that vicinity with the rates of fare charged by this plaintiff for the carriage of passengers over its said railway; that said Village has caused the Prosecuting Attorney of this county to institute, in the name of the State of Ohio, a proceeding in quo warranto in the Circuit Court of said county and numbered 2884 upon its docket, wherein the complaints aforesaid are fully set forth and the defendant therein is required to show by what warrant such fares are charged, and the relief prayed is to have all and singular the grants aforesaid declared null and void; that said action is pending; that answer therein is not yet due or required by law, and that the whole controversy which said Village and the other defendants herein are now seeking without authority or warrant of law by mere violence to solve, is involved and will be duly reached and decided by the Circuit Court of the county in the case before mentioned.

Wherefore plaintiff prays for an order to enjoin the defendants and each of them until further order of court from carrying the resolution passed as aforesaid on the second day of August, 1898, into execution; from interfering with or in any manner molesting plaintiff or any of its officers or agents in the quiet and peaceable enjoyment of its said railway property; from obstructing plaintiff, its officers or agents in maintaining its tracks and other railway appliances aforesaid in proper condition and repair, and from interfering with the plaintiff's use and operation of the same in the regular carriage of passengers through said Village along said tracks or any part thereof whatsoever; that upon final hearing hereof said order of injunction be made perpetual; that the ordinance passed as aforesaid on July 1, 1898, and the resolution passed on the second day of August, 1898, and each of them be declared and held to be invalid and void, and that such other and further relief may be granted the plaintiff in the premises as equity may require.

KITTREDGE & WILBY,
PAXTON, WARRINGTON & BOUTET,
Attorneys for Plaintiff.

(Duly verified.)

Supplemental Petition.

(Filed August 12, 1898.)

Plaintiff, by way of supplemental petition, alleges that its said road bed and tracks within the limits of the Village of Carthage are in many places out of repair and may be dangerous for travel, and that if said road bed and tracks are permitted to remain in such condition and out of repair, it may endanger the lives of passengers on plaintiff's cars traveling through said Village, and will be a menace

to the safety of said passengers and its cars and the employes operating the same.

Plaintiff further says that since the filing of its petition herein and the granting of a temporary restraining order by the court, it has applied to the Village Council of Carthage and to the Mayor of said Village for permission to repair its tracks, road bed and overhead work along the line of its said road and within the limits of said Village, as described in the petition herein, but that such request has been refused and denied, and permission to plaintiff to make any repairs on said street railway property has been and is refused and denied by said Council and Mayor, although plaintiff alleges the fact to be that in the operation and maintenance of its said road through said Village it is necessary for the safety of its passengers which are being carried by it from points beyond said Village into the city of Cincinnati, to make at once the repairs so requested by it as aforesaid.

Wherefore plaintiff prays as in its original petition herein.

KITTREDGE & WILBY,

PAXTON, WARRINGTON & BOUTET,

Attorneys for Plaintiff.

(Duly verified.)

Answer of Defendants.

(Filed August 16, 1898.)

Now come the said defendants, and for answer to the petition and supplemental petition filed herein, say:

These defendants admit that the Village of Carthage is a municipal corporation under and according to the laws of the state of Ohio; that Uriah Zerfey is the Marshal of said Village; that William E. French, Michael F. Molloy, F. P. Jackson, W. A. Ross, Louis J. Helfrich and Charles F. Schwarm compose the Council of said Village, and that J. L. Orbison is the Mayor of said Village.

These defendants admit that a street railway equipped with cars and electrical appliances and motive power is being operated for the carriage of passengers between the entrance of the Zoological Garden in Erkenbrecher avenue in the city of Cincinnati, and the Village of Lockland.

These defendants admit that on or about August 7th, 1894, an ordinance was passed by the Council of said Village of Carthage, entitled, "An ordinance to provide for the extension of the Cincinnati Inclined Plane Railway from the northern terminus of the Carthage pike over Main street and Lockland avenue to the north corporation line of the Village of Carthage."

And these defendants admit that the Cincinnati Inclined Plane Railway Company had, prior to the passage of said ordinance, constructed tracks in and along said Carthage pike as far north as said Lockland avenue.

They admit that the said ordinance of August 7th, 1894, was

accepted by the Cincinnati Inclined Plane Railway Company
191 and the railway was constructed in and along said Lockland
avenue from the Carthage pike to the north corporation lim-
its of said Village under and in pursuance of said ordinance.

And these defendants admit that on or about July 1st, 1898, the
council of said Village of Carthage passed an ordinance repealing
said ordinance of said Village, dated August 7th, 1894, and that on
or about the second day of August, 1898, the Council of said Village
adopted a resolution which in terms requires the owners of said elec-
tric railway to take up and remove its tracks and electrical appliances
and supports from said Carthage pike and from said Lockland avenue,
within the corporate limits of said Village, within ten days, and in
default of same being done said Council would take immediate steps
to abate said nuisance.

And these defendants admit that the Prosecuting Attorney of
Hamilton County, Ohio, instituted in the name of the state of Ohio
a proceeding in quo warranto in the Circuit Court of said county,
numbered 2884 upon its docket.

These defendants deny each and every other allegation or part of
allegation in plaintiff's petition and supplemental petition that is
not hereinbefore specifically admitted.

And for further answer these defendants say that the Cincin-
nati Inclined Plane Railway Company was organized under an act
of the General Assembly of the State of Ohio, entitled, "An act to
provide for the creation and regulation of incorporated companies
in the state of Ohio," passed May 1st, 1852, as a steam railway com-
pany.

These defendants further say that the ordinance passed by the
Village of Carthage on the seventh day of August, 1894, as aforesaid,
was an attempt on the part of said Village to grant to said the Cin-
cinnati Incline Plane Railway Company the right to extend its tracks
as a street railway, and that the acceptance of the same by the said
the Cincinnati Inclined Plane Railway Company was an attempt on
its part to extend its tracks as a street railway.

And these defendants say that the said Village of Carthage was
without authority of law to grant such right, and that said the Cin-
cinnati Inclined Plane Railway Company was without authority of
law to accept the same and to extend its tracks as a street railway, and
that said ordinance is void.

Wherefore these defendants pray that the temporary restraining
orders heretofore granted may be dissolved and that the peti-
192 tion and supplemental petition may be dismissed.

SAMUEL B. HAMMEL,
Solicitor for the Village of Carthage, and
JOHN R. SAYLER,
Attorneys for Defendants.

(Duly verified.)

Amendment to Petition.

(Filed October 31, 1898.)

Now comes the plaintiff, by leave of court, and not withdrawing, but reaffirming the allegations of its original and supplemental petitions, herein filed this, its amendment thereto; That it acquired the ownership averred in its petition of the line of electric street railway and property therein described by the titles stated below and in the following manner, to-wit, that said line of railway and property were sold under and according to a certain decree of foreclosure and sale made in case No. 4859 of the Circuit Court of the United States within and for the Southern District of Ohio, Western Division, Sixth Judicial Circuit, wherein the Louisville Trust Company, a corporation, was complainant, and the Cincinnati Inclined Plane Railway Company and W. A. Goodman, Trustee, and others, were defendants; that the existence of certain mortgages upon the line of railway and property described in its original petition herein was averred by the Louisville Trust Company, complainant, and W. A. Goodman, defendant and cross-petitioner in said cause, which had theretofore been duly executed and delivered by defendant therein, the Cincinnati Inclined Plane Railway Company, as the owner of said line of railway and property, and prayer was made for a foreclosure of said mortgages and the sale of said premises; that the said Cincinnati Inclined Plane Railway Company was duly served with process in said cause, and thereafter such proceedings were had therein that on or about the 14th day of February, 1898, said court entered its decree of foreclosure and sale in said cause, wherein and whereby it provided, among other things, that the Master Commissioner appointed by said court should sell at public auction the line of railway and property aforesaid; that in pursuance of said decree and order of sale the said line of railway and property were
193 on or about the 14th day of April, 1898, struck off and sold to Charles H. Kilgour; that thereafter said sale was duly confirmed by order of said court, and under said order said line of railway and property, together with the rights and franchises of said, the Cincinnati Incline Plane Railway Company therein, were ordered to be conveyed and were conveyed to said Kilgour; that the judgment and decree under which said sale was made and confirmed and a conveyance executed and delivered thereunder to said Kilgour remain in full force and effect, and no proceedings have ever been commenced to reverse or set aside the same; and this plaintiff hereby refers to the pleadings, orders and decree and record in said cause and prays leave to produce and exhibit the same as evidence at the trial hereof.

The plaintiff further avers that The Cincinnati, Hamilton, Middletown & Dayton Street Railway Company, the name of which company has since been changed as stated in the petition, was organized under the laws of Ohio, with authority to construct, maintain and operate street railroads for the transportation of passengers, packages, express

matter, etc., upon the public highways in this state between the cities of Dayton and Cincinnati; that at the time of the sale under the decree of the Circuit Court of the United States as aforesaid of said line of railway and property to said Kilgour, the said Kilgour purchased the same under and pursuant to an arrangement in that behalf previously made, and advanced the money necessary to pay for the same, whereby he obligated himself to lease so much of said railway and property as lies between the entrance to the Zoological Garden and the northernmost point in the Carthage pike, which is intersected by the corporation line of Cincinnati, and to sell and convey so much of said line of railway and property as lies north of the point last aforesaid to this plaintiff; that in pursuance of said arrangement this plaintiff at and before the commencement of this action entered into possession of said line of railway and property and the operation thereof as alleged in its original petition; and that in accordance with said arrangement this plaintiff has heretofore received the lease and deed of said line of railway and property.

Plaintiff further avers that it is advised by its counsel and upon such information it believes and so charges, that the ordinance referred to in its original petition which was passed on or about July 1, 1898, and in terms repeals the certain ordinance of said 194 Village of Carthage, dated August 7, 1894, and the certain resolution therein referred to which was passed on or about August 2, 1898, and in terms requires the owner of said line of electric railway to take up and remove its tracks and electric appliances and supports from said Carthage pike and from said Lockland avenue within the corporate limits of said Village, and the other acts therein mentioned as threatened to be committed by defendants, would, if carried into execution, be a violation, not alone of the Constitution of Ohio, but also both of Section 10, Article I, and Section 1 of Amendment XIV of the Constitution of the United States.

Wherefore, said plaintiff prays as in its original and supplemental petitions.

KITTREDGE & WILBY,
PAXTON, WARRINGTON & BOUTET,
Attorneys for Plaintiff.

(Duly verified.)

Answer of Defendants to the Amendment to Petition.

(Filed November 7, 1898.)

Now come the defendants and for answer to the amendment to the petition filed herein, October 31st, 1898, state that they admit that the said line of railway and property involved in this litigation were sold in case No. 4859 of the Circuit Court of the United States, within and for the Southern District of Ohio, Western Division, Sixth Judicial Circuit, etc., on or about the 14th day of April, 1898, to Charles H. Kilgour, and that pursuant to order of said court in

said case the same were conveyed to said Kilgour, but these defendants allege that they, nor any one of them, were not parties to said litigation under which said property was so sold.

These defendants deny that the ordinance referred to in the original petition, which was passed on or about July 1st, 1898, and the certain resolution therein referred to, which was passed on or about August 2d, 1898, and in terms requires the owner of said line of electric railway to take up and remove its tracks and electric appliances and supports from the Carthage pike and from said Lockland avenue within the corporate limits of said Village, and the other acts therein mentioned as threatened to be committed by defendants would, if carried into execution, be a violation of the Constitution of Ohio, or of Section 10, Article 1, or of Section 1, of Amendment XIV, of the Constitution of the United States. And these defendants deny each and every allegation or part of allegation in said amendment to petition contained not hereinbefore specifically admitted or denied.

SAMUEL B. HAMMEL AND
JOHN R. SAYLER,

Attorneys for Defendants.

(Duly verified.)

Amendment to Answer, etc.

(Filed by Leave December 8, 1898. Minute 576.)

Now come the said defendants and for an amendment to their answer to the petition and supplemental petition, and to their answer to the amendment to the petition, say that they reiterate and reaffirm each and every allegation contained in their said answer to the petition and supplemental petition and in their said answer to the amendment to the petition, and make them a part hereof as if fully herein set out.

And they further say that on or about the 2d day of August, 1898, the Council of the Village of Carthage duly adopted a resolution by which the occupancy of Main street north of the northern terminus of the Carthage pike, and the occupancy of Lockland avenue, all in the Village of Carthage, by the successor or successors of Cincinnati Inclined Plane Railway Company, and the maintenance by said successor or successors of the track, rails, poles and wires used in operating a street railway over said Main street and Lockland avenue were thereby declared to be a nuisance and it was thereby ordered that said track, rails, poles and wires be removed by the owners thereof from said Main street and Lockland avenue within ten days, and in default of same being done that said Council should take immediate steps to abate said nuisance.

And these defendants further say that on or about the 2d day of August, 1898, the said Council of the Village of Carthage duly adopted a resolution whereby the occupancy of Main street, Carthage pike, from the northern terminus of said Carthage pike to the

south corporation line of the Village of Carthage, all in said Village of Carthage, by the successor or successors of the Cincinnati Inclined Plane Railway Company, and the maintenance by said successor or successors of the tracks, rails, poles and wires and in 196 operating a street railway over said Carthage pike, were thereby declared to be a nuisance, and it was thereby ordered that said tracks, rails, poles and wires be removed by the owners thereof from said Carthage pike within ten days, and in default of the same being done said Council should take immediate steps to abate said nuisance; said action by said Council of said Village being the action of said Council referred to in the answer of these defendants as taken by said Council on or about August 2d, 1898, but not in said answer set out in full.

Wherefore, these defendants pray, as they have heretofore prayed, and they further ask that their answers herein may be taken as a cross-petition herein; that the court find and decree the maintenance and operation of said street railway in said streets and avenues of said Village to be without authority of law and to be a nuisance; that the plaintiff be enjoined from further operating and maintaining said street railway in said streets and avenues, and that a mandatory injunction may issue requiring them to remove the tracks, rails, poles and wires of said railway. And these defendants pray for all further proper equitable relief in the premises.

SAMUEL B. HAMMEL,

Solicitor at the Village of Carthage, and

JOHN R. SAYLER,

Attorneys for Defendants.

(Duly verified.)

Reply to Answer and Cross-Petition of the Village of Carthage.

(Filed February 10, 1899.)

Now comes the plaintiff, and for reply to the answer and cross-petition of the defendant, the Village of Carthage, denies that the Village of Carthage was without authority of law to grant to this defendant the right to extend its tracks as a street railway, and denies that The Cincinnati Inclined Plane Railway Company was without authority of law to accept the same.

And the plaintiff, further replying, reaffirms the facts stated in its original petition and supplemental petition and amendment to petition, and says that on or about the 17th day of May, 1892, 197 the Council of the Village of Carthage duly passed a resolution requesting the Cincinnati Inclined Plane Railway Company, which had therefore constructed its railway with a single track in said Village to the north terminus of the Carthage pike, to put in a double track as speedily as possible in said Carthage pike and from the entrance to the Zoological Garden, and that the roadway should be put in good repair as rapidly as the said tracks should be laid, in pursuance of the grant made by the Village Council to the said

railway company in March, 1889; and that the said Inclined Plane Railway Company complied with the request of the Council aforesaid and constructed an additional track, in pursuance of the resolutions of said Village Council and of the Commissioners of Hamilton County, at great cost and expense, and said railway has been maintained since then at great cost and expense to its owner, and said owner has at all times paid to the Village of Carthage and said Village has received the sum of fifty dollars per annum provided by the said ordinance of August 7, 1894, and to the County Commissioners the sum of one thousand dollars per annum required by the grant of said commissioners.

Plaintiff further says that the Village of Carthage, by its acquiescence and by divers acts ever since the passage of said resolution of March, 1889, is estopped from denying the right of this plaintiff to have and maintain its street railway through the Village of Carthage as the same was owned and held and operated by it at the time of the commencement of this action.

Wherefore plaintiff prays as it has heretofore prayed.

KITTREDGE & WILBY,

PAXTON, WARRINGTON & BOUTET,

Attorneys for Plaintiff.

(Duly verified.)

Transcript of Docket and Journal Entries in Case No. 3023, Circuit Court.

(Filed in Supreme Court July 28, 1899.)

Appeal. Transcript and original papers filed March 22, 1899. Common Pleas No. 114,342.

June 26, 1899. Application for services of official stenographer filed.

June 26, 1899. Security for fees of official stenographer approved and filed.

198 June 29, 1899. Minute 258: Order appointing Lida J. Bacon official stenographer.

Upon application of the plaintiff and defendant, the services of Lida J. Bacon, an official stenographer, are granted upon satisfactory security for the per diem fees of said stenographer in the above case being given, and Dennis Dwyer and W. E. French being offered as security, the court approves the same.

July 1, 1899. Minute 261: Final decree, defendant excepts.

This cause came on to be heard upon the pleadings, evidence and arguments of counsel; and the court being fully advised in the premises, upon consideration thereof, find the issues joined for the plaintiff.

It is thereupon considered and adjudged that the defendant, the Village of Carthage, its officers and agents be perpetually enjoined from interfering with or in any manner molesting plaintiff or any of its officers or agents in the quiet and peaceable enjoyment of its

said railroad property, from obstructing plaintiff, its officers and agents, in maintaining its tracks or other railway appliances in proper condition and repair and from interfering with the plaintiff's use and operation of its said railway in said Village, and that the cross-petition of the defendant, the Village of Carthage, be dismissed, and that the plaintiff recover against the said Village of Carthage its costs herein taxed at \$——. To all of which the defendants in error except.

July 3, 1899. Motion for new trial filed. July 21, 1899. Certificate given L. J. Bacon, official stenographer, for \$50.00.

July 25, 1899. Minute 291: Entry overruling motion for a new trial, defendants except.

The court coming to consider the motion for a new trial filed herein by the defendants, overrules the same, to which said defendants except.

July 25, 1899. Minute 262: Entry allowing bill of exceptions.

Now comes the defendants and present to the court their certain bill of exceptions herein, which the court find to be true and correct and that the same was submitted to the counsel for plaintiffs and to the trial Judges within the time required by law. Said bill of exceptions is therefore allowed, signed and sealed, and on motion is hereby ordered filed, with the pleadings, and made a part of the record of this case.

199 – 223 July 25, 1899. Minute 292: Bill of exceptions filed by leave.

(Duly certified.)

Motion for a New Trial.

(Filed July 3, 1899.)

Now come the defendants and move the court to set aside the findings and judgment herein, and for a new trial, for the reasons following, to-wit:

1st. The court erred in admitting evidence offered by the plaintiff, objected to by the defendants, to which ruling the defendants excepted.

2d. The court erred in refusing to admit evidence offered by the defendants at the trial, to which ruling the defendants excepted.

3d. The judgment is not supported by the evidence.

4th. The judgment is contrary to law.

5th. The judgment was for the plaintiff, when it should have been for the defendants.

6. The court erred in dismissing the cross-petition of the defendants.

7th. For other errors occurring at the trial and excepted to by the defendants.

SAMUEL B. HAMMEL AND
JOHN R. SAYLER,

Attorneys for the Defendants.

* * * * *

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EXHIBIT 2-A.

Amendment to Articles of Incorporation.

Copy of Amendment to the Articles of Incorporation of the Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company.

"Resolved, That the corporate name of this company be changed from that of The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company to that of The Mill Creek Valley Street Railroad Company, and the president and secretary are hereby directed to transmit, duly certified by their official signatures, and the seal of said company, to the Secretary of State of the State of Ohio, this said resolution for change of name of said company, pursuant to law."

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Certificate of Amendment.

To the Secretary of State, Columbus, Ohio:

The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, acting by its president and secretary, hereby certifies that the foregoing is a true copy of the original amendment to the articles of incorporation of The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, which was adopted by the votes of the owners of more than three-fifths of its capital stock, at a meeting thereof, held on the 15th day of July, 1898, at the office of said company in Cincinnati, Ohio, notice of which meeting was duly waived in writing as authorized by law.

In testimony whereof, the president and secretary of The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, acting for and on behalf of said corporation, have hereunto set their hands (there being no seal), this 22d day of July, A. D. 1898.

THE CINCINNATI, HAMILTON, MIDDLE-
TOWN & DAYTON STREET RAILROAD
COMPANY.

[SEAL.] By L. C. WEIR, *President*,
O. B. BROWN, *Secretary*.

(Duly certified.)

EXHIBIT 3-A.

An Ordinance Authorizing the Extension of the Cincinnati Inclined Plane Railway from the Inclined Plane to the North Corporation Line, at the Zoological Garden.

(Passed October 27, 1875.)

(Accepted Nov. 3d, 1875.)

SECTION 1. Permission to lay tracks on certain streets granted.

Conditions: Be it ordained, etc., that permission is hereby granted to The Cincinnati Inclined Plane Railway Company to use and occupy for a period of thirty (30) years, with a double track, Locust street, commencing at the Inclined Plane, thence north to Mason street, and Mason street from Locust east to Auburn street, and Auburn street with a single track from Mason street northerly to Vine street, and Vine (formerly Washington) street by a double track to the corporation line of the city and Avondale, with the privilege of using any tracks which may be laid by any other company, or if none are laid, then with the privilege of laying tracks to be used in common with other roads until said Vine street north of Hammond shall be suitably improved on Hammond or St. Clair streets to the Carthage pike or Ludlow avenue, and on said avenue to the corporation line; and upon said Vine street being suitably improved said company shall lay their tracks thereon, and the occupancy or use of any tracks above provided for west of Vine street shall cease. Said tracks to be laid upon the following terms and conditions:

First. They shall occupy the center of the street, each track to have the same relative position to the curb and center line of the street, and the tracks shall be of a *gauge* of five (5) feet two (2) inches, and shall be placed as near together as practicable, allowing for the safe and convenient passage of cars thereon. Wherever it may be necessary to take up and relay an existing track, it shall be the duty of said company, and it is hereby authorized, at its own expense, to take up and relay such track in its present good order and in its proper relation to the center of the street and such portion of the street as is disturbed by said company in the laying of its tracks, shall be put in good repair at its own expense. The rails to have an inside tram of not less than three inches, and to be submitted to the city civil engineer, and to be approved by him before being placed in the street.

Second. Before using any of the existing tracks the said company shall tender or pay to the persons or company owning the same an equal proportion of the costs of laying such tracks, and shall thereafter bear an equal proportion of the expense of keeping the same in repair.

Third. No motive power except horses and mules shall be used on said tracks.

Fourth. The charges for transportation over said portion of said company's lines shall not exceed five (5) cents cash, nor more than one ticket for each passenger, and the said company shall keep for sale and sell on the cars run on said portion tickets in packages of twenty-five (25) for one dollar, and shall also furnish on its cars through single tickets good for one passage to or from the Zoological Garden and the corner of Fifth and Main streets for ten cents.

227 Fifth. Before the said company shall commence the construction of said tracks it shall obtain the consent of a majority in interest of the owners of property abutting thereon.

Sixth. The said company shall pay and save the city harmless from any damage for which it may be liable for any injury to persons or property on account of the grant made under this ordinance, and said company shall pay such car license as may be fixed by future ordinance; provided, however, that the Council shall have, and it hereby reserves the power, to grant to any company or individual, or any number of companies or individuals, the right to occupy and use so much of the tracks aforesaid as shall be placed, and also the tracks and turn-outs which are now in use in Vine street, between Corry and St. Clair streets, whether that be more or less than one-tenth of this line or route; but the expense of laying and keeping in repair such portion of said tracks shall be borne equally by all those using the same; and further provided, that this ordinance shall not take effect, nor any rights hereunder vest, until and unless The Cincinnati Inclined Plane Railway Company shall file with the city Auditor its acceptance of the same, and also procure and file with said Auditor the consent of the owners of the tracks and turn-outs in Vine street, between Corry and Hammond streets, to the use as above provided of said tracks and turn-outs.

EXHIBIT 4-A.

Grant by County Commissioners.

To Whom it May Concern:

The following appears of record in Vol. No. 18, pages Nos. 522 and 523, County Commissioners' minutes, March 23, 1889:

By the Board:

Resolved, That the application of The Cincinnati Inclined Plane Railway Company for the permission to use and occupy with double tracks and with necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage turnpike, commencing at a point at or near its intersection with Ludlow avenue and running thence upon and along said Carthage turnpike to its northern terminus at or near the county fair grounds
228 at Carthage, so as to enable the said company to furnish continuous rapid and safe transportation between Fountain

Square in Cincinnati and the Village of Carthage in this county, be and the same is hereby granted upon the following terms and conditions:

1st. That said company shall replace and restore the said portion of said turnpike in as good order and condition as they find it, at its own expense.

2d. That said company shall pay and save the county harmless from any and all damages for which it may be liable for any injury or inconvenience to persons or property by reason of construction or operation of said road over said portion of said turnpike, and the top of the rails must in no case project above the level of the surface of the pike.

3d. The work to be done to the satisfaction of the county engineer and County Commissioners; any differences arising between said engineer and the company to be submitted to the County Commissioners for a fair and equitable adjustment.

4th. The tracks to be laid on each side of said turnpike, leaving a clear space of twenty feet in the center of said turnpike for travel, except over the bridges, or as may be otherwise ordered by the Council in the villages through which said road is located.

The center of the poles supporting lateral wires to be placed at no points except eighteen inches within the curb line, allowing twelve feet for sidewalks, and to be located in such manner as to cause no obstruction to the vehicular or pedestrian travel now or in the future.

5th. The said electric road to be constructed, completed and put in operation within twelve months from the time said company shall have acquired the legal right to so construct, excluding, however, from the computation, such periods of time during which the work of construction may be delayed without any fault of said company; the work of construction must be commenced, however, within ninety days from the date of the passage of this resolution.

6th. The rates of fare shall not exceed the following:

Fifteen cents cash for a single trip between Fountain Square and Carthage or Elmwood or return.

Ten cents cash for a single trip between Fountain Square and St. Bernard or Ludlow Grove or return.

Ten cents cash for a single trip between the Zoological Garden and Carthage or Elmwood or return.

229 Five cents cash for a single trip between the Zoological Garden and St. Bernard or Ludlow Grove or return.

The said company shall, however, keep for sale upon its cars tickets in packages as follows:

Eight tickets for one dollar, each ticket to be good for a single trip between Fountain Square and Carthage or Elmwood or return.

Twelve tickets for one dollar, each ticket to be good for a single trip between Fountain Square and St. Bernard or Ludlow Grove or return.

7th. The bridge over the canal in St. Bernard to be widened in such manner and at such cost as may be agreed upon between said

company and said County Commissioners; the cost, however, when agreed upon, is to be paid equally by said company and said Commissioners.

8th. Said company shall pay into the county treasury on the first day of January, 1891, the sum of \$500.00; on the first day of January, 1892, the sum of \$500.00, and \$1,000.00 on the first day of January of each succeeding year so long as the said turnpike shall remain a toll road under the charge of said County Commissioners; said sum to be applied by said County Commissioners in making the necessary repairs to said turnpike; and if said amounts so agreed to be paid by said company be not paid when the same are due and demand made therefor by the County Commissioners, that the County Commissioners have the right summarily to stop the running of the cars, and in the event of such stoppage no liability for damages shall accrue.

9th. The Cincinnati Inclined Plane Railway Company shall, on or before April 10th, 1889, file its bond to be approved by the County Solicitor, in the penal sum of \$10,000.00, conditioned upon the faithful performance of this contract.

10th. The County Commissioners to cause the removal of any and all telegraph or telephone poles which may interfere with the operation of said electric road.

Gosling—Aye. Staley—Aye. Anthony—Aye.

Vol. 18, Page 490, County Commissioners' Minutes, February 13, 1889.

Petitions were received and read from citizens of St. Bernard, Elmwood and Carthage, and also certified copy of ordinance adopted by the Village Council of Carthage, requesting this board to grant the Mt. Auburn Inclined Plane Railway Company the right to construct a double track electric railway over the Carthage pike, and on motion the same were ordered filed.

"To the Honorable the Commissioners of Hamilton County, Ohio.

"GENTLEMEN: At a special meeting of Council, held on the 12th day of February, 1889, the following preamble and resolution were unanimously adopted, and a certified copy thereof ordered transmitted to your honorable board:

"Whereas, This Council, at a special meeting held on the 29th day of January, 1889, adopted certain resolutions in reference to the construction of an electric street railway over the Carthage turnpike, from Cincinnati to Carthage, and

"Whereas, Upon full investigation, we are satisfied that The Cincinnati Inclined Plane Railway Company are now operating a railroad to the Zoological Garden, which they propose to extend to Carthage, and which, if so extended, will furnish to our citizens the most direct and shortest route to and from the city; therefore

"Resolved, That the Honorable Board of County Commissioners be, and they are hereby requested to grant to said, The Cincinnati Inclined Plane Railway Company, the right of way to construct

an electric street railway over the said Carthage turnpike, as asked in their application to said County Commissioners."

In testimony, I have hereunto set my hand and seal of office this 12th day of February, 1889.

E. E. ROSS,

Clerk of the Village of Carthage, Ohio.

(Duly certified.)

EXHIBIT 5-A.

Consent of Zoological Land Syndicate.

April 6, 1889.

Whereas, The Cincinnati Inclined Plane Railway Company has obtained the right from the County Commissioners of Hamilton County, Ohio, to use and occupy with double tracks and with the necessary appendages and appurtenances of an overhead electric street railway system the Carthage turnpike, commencing at a point in or near its intersection with Ludlow avenue and
231 running thence upon and along the said Carthage turnpike to its northern terminus at or near the county fair grounds at Carthage, so as to enable the said company to furnish continuous, rapid and safe transportation between Fountain Square in Cincinnati and the Village of Carthage in said county, and

Whereas, The said Cincinnati Inclined Plane Railway Company desires to secure the right of constructing and extending said electric road through the property of the Zoological Garden Syndicate to the Carthage turnpike,

Now, the undersigned, as trustees for said syndicate, hereby grant to The Cincinnati Inclined Plane Railway Company the right to construct and extend double tracks, with the necessary appendages and appurtenances of an overhead electric street railroad system, from the present northern terminus of said railroad to Erkenbrecher avenues and thence upon and along said avenue to the Carthage turnpike.

It being expressly understood that said trustees hereby give this right upon the express condition that said Cincinnati Inclined Plane Railway Company permits other duly authorized railway companies to run over the tracks so laid as aforesaid by said Cincinnati Inclined Plane Railway Company, provided (1) that the cars of such other company shall not be so operated upon such tracks on said premises as to interfere with the operation of the cars of The Cincinnati Inclined Plane Railway Company; and (2) that the owner or owners of such other street railroads to whom such privilege is granted shall pay to The Cincinnati Inclined Plane Railway Company a proportionate share of the cost of construction and maintaining the portion of the tracks by them so used, and in the event of the failure to agree upon an amount to be paid the Cincinnati Inclined Plane Railway Company under the provision hereof, each of said parties shall appoint an arbitrator and such arbitrators a

third person, who together shall determine the same; and the decision of a majority shall be final, and the expense of such arbitration shall be equally divided between the company so requesting said privilege and the said Cincinnati Inclined Plane Railway Company.

The work of laying such tracks shall be done by said Cincinnati Inclined Plane Railway Company in accordance with the directions of the engineer of said trustees in manner to conform to the grades and not to injure said streets and avenues.

232-239 In witness whereof we have hereunto set our hands this 6th day of April, A. D. 1889.

ZOOLOGICAL LAND SYNDICATE,
By JULIUS DEXTER,
ALBERT G. ERKENBRECHER.

Trustees.

EXHIBIT 6-A.

Record in Case No. 4859, U. S. Circuit Court.

No. 4859. In Equity.

THE LOUISVILLE TRUST COMPANY, Complainant,

vs.

THE CINCINNATI INCLINED PLANE RAILWAY COMPANY, Defendant.

NOTE.—The proceedings in this case are sufficiently recited in the deed from the Cincinnati Inclined Plane Railway Company, per special commissioner, to Charles H. Kilgour, shown in Exhibit 8-a, and the decree is set forth in full in Exhibit 9-a, hereto attached.

It will therefore be unnecessary to print this exhibit in full to show the errors complained of.

* * * * *

240 *Decree in the United States Circuit Court in Cause No. 4797.*

(Entered February 7th, 1896.)

This cause having come on to be heard upon the pleadings and proofs, was argued to the court, and upon due deliberation having been had, the court finds the equities of the case to be with the defendant, the City of Cincinnati.

It is therefore ordered, adjudged, and decreed that the bill of complaint and the intervening petitions of W. A. Goodman and The Cincinnati Inclined Plane Railway Company be and the same are hereby dismissed at the costs of the complainant, and the complainant and the defendants, W. A. Goodman, trustee, and The Cincinnati Inclined Plane Railway Company, give notice of appeal to the Circuit Court of Appeals.

The dismissal as to the intervening petition of W. A. Goodman is

241 without prejudice to any right which he may have to proceed in the courts of the state of Ohio, and the City of Cincinnati objected to that part of this order which made the dismissal of the intervening petition of W. A. Goodman, trustee, without prejudice, as above stated and excepted thereto.

Decree in the United States Circuit Court of Appeals in Cause No. 426.

No. 426.

THE LOUISVILLE TRUST CO.
versus
THE CITY OF CINCINNATI.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Ohio and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby reversed with costs, and the cause is remanded to the court whence it came with directions to grant leave to amend and for further orders and decrees not inconsistent with the opinion of this court.

October 5, 1896.

A correct copy of which opinion appears in the 76th Federal Reporter, page 296, and by consent of counsel the same may be, at any trial or hearing of this cause, referred to in said volume as a part of this bill, the same as if at large set forth herein.

(Duly certified).

EXHIBIT 8-X.

Entry of Consolidation.

No. 4797.

LOUISVILLE TRUST CO.
versus
THE CITY OF CINCINNATI.

No. 4859.

LOUISVILLE TRUST CO.
versus
THE CIN'TI INC. PLANE CO.

And now comes complainant in said above entitled causes and on its motion it is now ordered that these causes be consolidated, and

242 that they shall hereafter proceed as one cause under the style of the second named cause as above.

Entered December 19, 1896, Journal 3, page 458, U. S. Circuit Court, Southern District, Ohio, Western Division.

EXHIBIT 8-A.

Deed of Philip B. Spence, Special Commissioner, to Charles H. Kilgour.

Know All Men by These Presents:

That, Whereas, The Louisville Trust Company, incorporated under the laws of the Commonwealth of Kentucky, under the corporate name of The Louisville Safety Vault & Trust Company, and afterwards changed by Act of the General Assembly of the Commonwealth of Kentucky to "The Louisville Trust Company," and being a citizen of said Commonwealth and having its principal place of business in the City of Louisville in said Commonwealth on the 12th day of October, A. D. 1895, filed its bill of complaint in equity in case No. 4859 in the Circuit Court of the United States in and for the Western Division of the Southern District of Ohio, against The Cincinnati Inclined Plane Railway Company, a corporation existing under the laws of the State of Ohio, and a citizen thereof, praying among other things for a decree against the defendant, The Cincinnati Inclined Plane Railway Company, for the amount of certain interest coupons alleged to have become due on July 1st, 1895, upon three hundred and seventy-five thousand (\$375,000) dollars, par value, of second mortgage bonds issued to The Louisville Safety Vault & Trust Company as Trustee under the provisions of an indenture dated January 1st, 1889, by and between said railway company, and said trust company; and for the amount of any other interest coupons which should become due pending the litigation; for a receiver to take possession of all the property embraced in the mortgage securing said bonds, and to operate the same and apply the proceeds to the payment of said overdue interest coupons, and for the sale of the property embraced in the mortgage securing said bonds and described in said bill of complaint, to satisfy the holders of said bonds, and,

Whereas, afterwards, to-wit, but on the same day, The Cincinnati Inclined Plane Railway Company filed its answer in said case admitting the issuing of the bonds and the execution of the mortgage securing the same in the manner and form alleged in the bill of complaint, admitting the default in the payment of the interest due July 1st, 1895, averring its inability to pay the same, and consenting that the property embraced in the mortgage to complainant should be placed in the hands of a receiver, and,

Whereas, afterwards, to-wit, but on the same day, an entry was made on the journal of the court in said cause appointing Brent Arnold as receiver, and directing him to take possession of all the property of The Cincinnati Inclined Plane Railway Company de-

scribed in the bill of complaint, and to control, manage and operate the same until further order of the court, and,

Whereas, afterward, to-wit, on December 19th, 1896, an order was made in said cause consolidating with it cause No. 4797 in the same court, wherein The Louisville Trust Company is complainant and The City of Cincinnati is defendant, and directing that all further proceedings in said case be carried on under the number and title of case No. 4859, and,

Whereas, afterward, to-wit, on July 3d, 1897, W. A. Goodman, surviving trustee of the first mortgage bondholders, having obtained leave of court to intervene, filed his intervening petition in said cause, averring among things the issuing to him and to Henry Peachey, now deceased, as trustees, on January 1st, 1879, by The Cincinnati Inclined Plane Railway Company, of one hundred and twenty-five (125) bonds of one thousand (\$1,000) dollars each, bearing interest at seven per cent. per annum, payable semi-annually, the principal of said bonds being payable on January 1st, 1899, and the execution to him and said Peachey as trustees, as security for said bonds, by the said The Cincinnati Inclined Plane Railway Company of its first mortgage upon all and singular the railways, rails, bridges and real estate, and all the tolls, income, issues and profits to accrue from the same or any part thereof belonging to or held by said company, and all and singular the cars and rolling stock, and also all and singular the franchises and property, real and personal, of said company; also averring that default had occurred in payment of the installment of interest on each of said first mortgage bonds due and payable on the 1st day of July, 1897, and praying for a foreclosure of the mortgaged property for the payment of the interest and principal of the first mortgage bonds, and,

244 Whereas, afterwards, to-wit, on September 11th, 1897, the complainant, The Louisville Trust Company, filed its amended and supplemental bill of complaint averring in addition to the averments of its original bill, the appointment and qualification of Brent Arnold, receiver, and his operation of the property of The Cincinnati Inclined Plane Railway Company under and in accordance with the orders of said court; his surrender of the custody and operation of said railway under order of court upon January 28th, 1897, and his resumption of the custody and operation of said railway under order of court entered August 23d, 1897; the execution and issuing by The Cincinnati Inclined Plane Railway Company of its 125 bonds of one thousand (\$1,000) dollars each and secured by mortgage executed January 1st, 1877, on its property between Fountain Square in the City of Cincinnati and the Zoological Garden in the Village of Avondale; the change in motive power used on said railway from horses to electricity after the execution of the mortgage to Goodman and Peachey, trustees; and averring the priority and superiority of the line of The Louisville Trust company, trustee, complainant, upon all the electric cars and equipment of said street railway; and averring further the payment by the receiver under order of court of the installments of interest which became due January 1st, and July 1st, 1896, upon the bonds secured by the mortgage to The Louisville Trust Company, trustee, and averring

that more than ninety days had elapsed since the installment of interest due January 1st, 1897, was payable; that the holders of more than one-half the bonds secured by said mortgage had requested said complainant, as was provided in said mortgage, to declare the principal of said bonds due, and that the complainant had, on August 31st, 1897, upon such request and in pursuance of the provision of said mortgage, declared the principal of said bonds due, and had notified the maker of said mortgage thereof, and praying, among other things, for a decree finding the entire amount of said bonds, to-wit, \$375,000.00, and two installments of interest of \$11,250.00, such to be due with interest, and, generally as in its original bill of complaint, and averring further that after the consolidation of cause No. 4797 with cause No. 4859 in said court, in the consolidated action an order was entered whereby it was adjudged and decreed that The Cincinnati Inclined Plane Railway Company was not entitled

245 to maintain or operate any railroad or railroad tracks in the City of Cincinnati south of Liberty and Main streets, and that the tracks then being operated by said company were being maintained and operated contrary to law; and further, that on Auburn avenue between Mason and Vine streets, that said railway company was entitled to maintain and operate but one railway track, and that one of the tracks then being maintained and operated was not lawful, and averring further that under and by the authority of the City of Cincinnati all of the tracks south of Liberty and Main streets, and one of the tracks on Auburn avenue between Mason and Vine streets, were torn up and removed from the streets, and that said railway company is entitled to maintain and operate only the line of railway existing from Liberty and Main streets along Main to the Inclined Plane with a double track and from the summit of the Inclined Plane along Locust and Mason streets with a double track, and on Auburn avenue from Mason to Vine streets with a single track, thence along Vine street and thence to the northern terminus of the road with double tracks, and which railway tracks and inclined plane were being operated by the receiver, and,

Whereas, afterwards, to-wit, on November 15th, 1897, The Columbia Finance & Trust Company, a corporation under and by virtue of the laws of the State of Kentucky, and a citizen thereof, having obtained leave of court to intervene, filed its intervening petition in said cause, averring among other things, the execution and delivery to it by The Cincinnati Inclined Plane Railway Company on March 26th, 1891, of a certain deed of trust or mortgage on all its property as security for the dividends upon certain preferred capital stock of said The Cincinnati Inclined Plane Railway Company, amounting to one hundred and fifty thousand (\$150,000) dollars, and praying among other things for a decree for the amount of the dividends on said preferred capital stock alleged to be then in arrears, and in case a sale of the property described in its mortgage should be ordered that the interest of said intervening petitioner might be protected by proper decree of the court, and,

Whereas, such proceedings were afterwards had upon said original and amended and supplemental bills of complaint and intervening petitions, that on the 14th day of February, A. D. 1898, it was by

said court ordered and adjudged that there was then due and unpaid to the holders of the \$125,000 of bonds (hereafter known in this instrument as first mortgage bonds) secured by the deed of trust executed to W. A. Goodman and Henry Peachey, trustees 246 (of which trustees W. A. Goodman is now the survivor), the installment of interest which fell due July 1st, 1897, amounting to \$4,375.00, and the installment of interest which fell due January 1st, 1898, amounting to \$4,375.00, with interest on said sums from the respective due dates, that other instalments of interest of like amount will fall due July 1st, 1898, and January 1st, 1899, and that the principal of said \$125,000 of bonds will be due at said last date, and that to secure the amount so due and to become due to the holders of the first mortgage bonds there was adjudged a lien in favor of said W. A. Goodman, trustee, prior and superior to all others upon the following described property of The Cincinnati Inclined Plane Railway Company, viz.:

Its line of electric street railway from Main and Liberty streets, in Cincinnati, north to the inclined plane, the inclined plane with all of its machinery, appurtenances and improvements; and the line of railway from the summit of the inclined plane to the entrance to the Zoological Garden at Erkenbrecher avenue, together with three-elevenths of the rolling stock and entire equipment of the said The Cincinnati Inclined Plane Railway Company; the said railway being operated over double tracks, except on Auburn avenue, between Mason street and the intersection of Auburn avenue with Vine street.

That there was then due and unpaid to the holders of the \$375,000 of bonds issued and outstanding (hereafter known in this instrument as second mortgage bonds), and secured by the deed of trust to The Louisville Trust Company, trustee, the installment of interest which fell due January 1st, 1897, amounting to \$11,250, and the installment of interest due July 1st, 1897, amounting to \$11,250, with interest on said sums from their respective due dates, and that in pursuance of a provision in said deed of trust to The Louisville Trust Company, trustee, the principal of said bonds amounting to \$375,000 became due, and bore interest from July 1st, 1897; that to secure the payment of the principal and interest due on the second mortgage bonds there was adjudged a lien in favor of The Louisville Trust Company, trustee, on the foregoing described property second only to that of W. A. Goodman, trustee, and a lien prior and superior to all others, including said Goodman, trustee, upon the following described property of The Cincinnati Inclined Plane Railway Company, viz.:

247 Its line of double track electric street railroad with all poles, wires and other appurtenances, beginning at the entrance to the Zoological Gardens at Erkenbrecher avenue and thence northwardly over Erkenbrecher avenue, Carthage pike, Ludlow avenue, Wayne avenue, Wyoming avenue to Lock street, in the Village of Lockland, including power house No. 2, and the real estate belonging thereto at Ludlow Grove, together with all improvements and appurtenances belonging to said power house and also eight-elevenths of the entire rolling stock and equipment of the said The Cincinnati Inclined Plane Railway Company, and,

Whereas, it was further ordered and decreed in said cause that in case the property so adjudged to be in lien as aforesaid should not be redeemed on or before the 19th day of February, 1898, the same should be sold to satisfy the liens thereon, and Philip B. Spence, Esq., was thereupon appointed by the court a special commissioner to make the sale, and,

Whereas, the order, judgment and decree of said Court as to redemption not having been complied with on the 21st day of February, A. D. 1898, in pursuance of said former order, judgment and decree, an order of sale was issued out of said Court under the seal thereof to said Philip B. Spence, special commissioner, directed, commanding him to execute said order, and of the same, together with his proceedings thereon to make due return, and,

Whereas, it was further ordered, adjudged and decreed in said cause that said sale should be made upon the premises of The Cincinnati Inclined Plane Railway Company at the head of the inclined plane: the city of Cincinnati, Ohio; that the sale should be for cash and free of the liens of all parties to said cause after being advertised for six weeks in one or more daily newspapers published in the city of Cincinnati; that the special commissioner should first offer the property upon which the trustee of the first mortgage bondholders was adjudged to have the first lien, and then offer the property upon which the trustee of the second mortgage bondholders was adjudged to have the first lien, and then offer the property covered by both liens as a whole, and in the event that the property as a whole should bring more than the aggregate of the separate bids, the special commissioner should cry off the same to the bidder for the whole, and,

Whereas, it was further ordered, adjudged and decreed in said cause that the special commissioner should not receive any bid for the property upon which the trustee of the first mortgage
248 bondholders was adjudged to have the first lien of less than \$90,000.00, and no bid for the property upon which the trustee of the second mortgage bondholders was adjudged to have the first lien of less than \$187,500.00, and,

Whereas, the premises set out and described in said decree and order for sale in said cause having been duly advertised according to law and the order of court in said cause, and the statutes of Ohio in such case made and provided having been fully complied with, the said Philip B. Spence, special commissioner, did on the 14th day of April, A. D. 1898, at 12 o'clock noon of said day, in accordance with said advertisement, on the premises of The Cincinnati Inclined Plane Railway Company, to-wit, at the head of the inclined plane, in the city of Cincinnati, Ohio, expose to sale at public auction the property hereinafter described, and the up-set price having been bid upon each of said properties, and thereupon Charles H. Kilgour did bid for the same as an entirety the sum of \$278,000.00, which sum being the highest and best bid for the same and more than the aggregate of the up-set prices fixed by the Court upon the respective parcels of said property, and more than *than* the aggregate of the bids for the respective parcels thereof, the said premises and property

were then and there struck off to said Charles H. Kilgour for the sum and upon the terms above mentioned, and,

Whereas, on the 7th day of May, A. D. 1898, the said Court having examined the proceedings of the said Philip B. Spence, special commissioner, under said order of sale, and being satisfied that said sale was made in all respects according to law and the order of the Court, ordered that said sale be confirmed, and that said Philip B. Spence, special commissioner, should execute a deed for said property, rights and franchises so sold as aforesaid to Charles H. Kilgour, the Court reserving the right on failure of the purchaser to comply with the terms of sale as to payment and with all the provisions of the decree of confirmation, to retake possession of the property so sold as aforesaid, and to resell the same for the purposes of carrying out the intent and meaning of the decree of sale in said cause.

Now, therefore, I, Philip B. Spence, special commissioner, in consideration of said sum of two hundred and seventy-eight thousand (\$278,000.00) dollars paid to the clerk of the court in pursuance of the order of the Court by said Charles H. Kilgour, the receipt whereof is hereby acknowledged, and by virtue of the proceedings, orders, etc., aforesaid, do hereby grant, bargain, sell and convey unto said Charles H. Kilgour, his heirs and assigns forever, all the property so ordered to sold as aforesaid, and particularly described as follows:

The line of street railway from Main and Liberty streets in Cincinnati, to Lock street in the Village of Lockland, in Hamilton county, Ohio, together with the inclined plane at the head of Main street, with all of its machinery, appurtenances and improvements, the said railway being more particularly described as follows:

The overhead single trolley electric street railroad beginning at Liberty street, on Main street, in the city of Cincinnati; thence north by double tracks to the foot of the inclined plane; thence over the inclined plane, including the said inclined plane as aforesaid, by double tracks to the head thereof; thence north on Main or Locust street by double tracks to Mason street; thence eastwardly on Mason street by double tracks to Auburn avenue; thence north on Auburn avenue by single track to its intersection with Vine street; thence north on Vine street by double tracks to the entrance of the Zoological Garden at Erkenbrecher avenue; thence northwardly on Erkenbrecher avenue by double track to its intersection with Carthage pike; thence north on Carthage pike by double tracks through the Villages of Clifton, St. Bernard, Elmwood and Carthage to the gas house; thence via Ludlow avenue or Carthage pike by double tracks to bridge over Mill Creek; thence north by double tracks over Wayne avenue through the Villages of Hartwell and Lockland to Wyoming avenue; thence east on Wyoming avenue or Benson street by double tracks to Lock street in the Village of Lockland, together with all the rights, privileges and franchises to the same appertaining or in any wise belonging.

Also all poles, wires and other appliances necessary or convenient to or used in the operation thereof; also all machinery and appliances in the power house at the head of the inclined plane, known

as power house No. 1, and including, among other things, four boilers, two Corliss engines for running the dynamos, six dynamos, two engines for operating the inclined plane, two old boilers under the plane, and the necessary steam pipes, shafting, bolts, cables, brakes, signaling apparatus, connections and other machinery for a complete electric generating station and inclined plane power plant;

and the trucks used upon the said inclined plane, and also
250 all machinery and appliances in the power house at Ludlow

Grove, Hamilton county, Ohio, known as power house No. 2, consisting of three boilers, one 254-horse power Brown-Corliss engine, one 150-horse power Ball engine, five generators, with necessary steam pipes, switch boards, connections and other apparatus for a complete electrical generating station.

Together with all the rolling stock and equipment of said The Cincinnati Inclined Plane Railway Company, which consists of thirty-nine motor cars, each equipped with two 15-horse power Sprague motors. Of these eight are eighteen feet long, twenty-one are sixteen feet long and ten are fourteen feet long. One sprinkling cart equipped with two 15-horse power Sprague motors; also four horses and two line and work wagons, together with all wheels, motors, or parts of motors, and any and all interchangeable parts, or material in the rough, or supplies on hand to be used in and upon said cars and motors.

Also, the following described real estate, with the improvements thereon, situate in Cincinnati, Hamilton county, Ohio, to-wit:

(a.) Lot 36 as numbered on the recorded plat made by Salmon P. Chase, trustee of Greenbury Dorsey, fronting 35 feet, more or less, on the north side of Mulberry street and extending northwardly 125 feet, more or less, to Miami street, the leasehold of said premises having been conveyed to The Cincinnati Inclined Plane Railway Company by deed from William Von Tielan and wife for the west half, recorded in Deed Book 392, page 457, and from Henry Winkelman for the east half, recorded in Deed Book 392, page 459, Hamilton County Deed Records, and the fee of said premises with other premises having been conveyed to the same grantee by deed from the trustees of the Hughes fund, recorded in Book 396, page 235, Hamilton County Deed Records.

(b.) Lots 46 and 73, as numbered on the recorded plat made by Salmon P. Chase, trustee of Greenbury Dorsey, lot 46 fronting 35 feet on the north side of Miami street and extending north along the inclined plane 120 feet to Baltimore street, and lot 73, commencing at the northeast corner of Locust and Dorsey streets; thence east on Dorsey street 33 feet; thence northwardly between parallel lines on the east side of Locust street 120 feet, said lots 46 and 73 being the same premises with others conveyed to The Cincinnati Inclined Plane Railway Company by the trustees of the Hughes fund
251 by deed dated January 30th, 1872, and recorded in Book 396, page 235, Hamilton County Deed Records.

Also, 33 feet of ground across the north end of said lot 73 and extending northwardly along the east side of Locust street 25 feet

and being the south half of a 50 foot street known on the Dorsey Blue Plat as Reeder street, and vacated January 17th, 1879.

(c.) Also the perpetual leasehold estate in lots 82, 83, 84 and 85 on the Dorsey Blue Plat, said lots each fronting 33 feet on the south side of Mount street and extending back southwardly at right angles to Mount street a uniform depth of 120 feet, said leaseholds on lots 82, 83 and 85 having been conveyed to The Cincinnati Inclined Plane Railway Company by Frederick G. Huntington and wife by deed dated June 13th, 1872, and recorded in Deed Book 404, page 440, Hamilton County Deed Records, and the leasehold on lot 84 having been conveyed to The Cincinnati Inclined Plane Railway Company by James S. Story and wife by deed dated January 5th, 1872, and recorded in Deed Book 396, page 237, Hamilton County Deed Records.

Also lot 86 in the same subdivision, being at the southeast corner of Locust and Mount streets and fronting 42 feet on the south side of Mount street and extending back southwardly between parallel lines on the east side of Locust street 120 feet and being the same premises with others conveyed to The Cincinnati Inclined Plane Railway Company by the trustees of the Hughes fund, on January 30th, 1872, and recorded in Deed Book 396, page 235, of Hamilton County Deed Records.

Also, a strip 25 feet in depth across the south end of lots 82, 83, 84, 85 and 86, and being the north half of a 50 foot street known on the Dorsey Blue Plat as Reeder street and vacated January 17th, 1879.

(d.) Also lots B and D of the subdivision between the heirs of Alexander McGrew, recorded in Deed Book 137, page 488, Hamilton County Records; said lots having been conveyed to The Cincinnati Inclined Plane Railway Company, as follows:

Lot B, by Jacob Hecker and wife, by deed dated April 6th, 1876, and recorded in Deed Book 456, page 323, and lot D, by Joseph S. Hill and wife, by deed dated August 14th, 1875, and recorded in Deed Book 446, page 467, Hamilton County Deed Records.

(e.) Also the following described leasehold estate on the east side of Sycamore street, opposite Orchard street, being 70 feet in front by 200 feet in depth to Mansfield street, the north half of which property was conveyed to The Cincinnati Inclined Plane Railway Company by lease from Joseph Hutchins and wife, dated December 28th, 1883, and recorded in Lease Book 73, page 530, Hamilton County Records, and the south half by lease from Julia A. Gallup, dated December 28th, 1883, and recorded in Lease Book 73, page 533, Hamilton County Records.

(f.) Also lot No. 60 on the Dorsey Blue Plat, lying east of the inclined plane, fronting 35 feet on the south side of Dorsey street and extending back to Baltimore street, and being the same premises conveyed to The Cincinnati Inclined Plane Railway Company by Catherine L. Anderson by deed dated January 19th, 1892, and recorded in Deed Book 733, page 48, Hamilton County Deed Records.

(g.) Lots 20 and 21 in Square 67 of Reeder's Subdivision of Find-

lay and Ludlow's Subdivision as recorded in Book 21, page 266, and being same premises conveyed to The Cincinnati Inclined Plane Railway Company by E. R. Donohue, executor of E. B. Reeder, deceased, by deed dated November 9th, 1885, and recorded in Deed Book 602, page 284, Hamilton County Records.

(h.) Lot 32 and part of lots 45 and 46 on the plat made by S. P. Chase, trustee of Greenbury Dorsey, said lot 32 fronting 25 feet on the north side of Mulberry street and being the same premises conveyed to John W. Gaulbert, trustee, by Oliver Kinsey and wife by deed dated July 16th, 1892, and recorded in Deed Book 740, page 623, Hamilton County Deed Records, and the part of lots 45 and 46 fronting on Miami street west of the inclined plane and being the same premises conveyed to J. W. Gaulbert, trustee, by Nellie Molloy et al. by deed dated May 14th, 1894, and recorded in Deed Book 768, page 390, Hamilton County Deed Records, the said J. W. Gaulbert holding the title to said lot 32 and part of lots 45 and 46 as trustee for The Cincinnati Inclined Plane Railway Company.

(i.) Lot A on a plat of subdivision made by Henry Hemmelgarn, special master, of Louis A. Koch's estate, as shown in Plat Book 4, page 108, Hamilton County Records, said lot being on the southwest corner of Mount and Locust streets, fronting 25 feet on Mount by 100 feet on Locust street and being the same premises conveyed to H. M. Littell by W. B. Clouser, per the Sheriff of Hamilton County, Ohio, by deed dated May 6th, 1889, and recorded in 253 Deed Book 683, page 70, of Hamilton County Deed Records; the grantee, H. M. Littell, holding the title to said lot as trustee for The Cincinnati Inclined Plane Railway Company.

Also the following described real estate situate at Ludlow Grove, Hamilton county, Ohio, upon which power house No. 2 is erected, the said real estate being in Section 11, Mill Creek Township, Hamilton county, Ohio, and being the same premises conveyed to The Cincinnati Inclined Plane Railway Company by the B. & O. S. W. Railroad Company by deed dated September 19th, 1891, and recorded in Deed Book 745, page 238, of the Deed Records of Hamilton county, Ohio, together with all the improvements and appurtenances upon said lot, said lot being more particularly described as follows:

Beginning at a point in the center of the creek called Ross Run distant S. $4^{\circ} 25'$ E. 17.2 feet from the center of the face of the north abutment of the bridge upon which the Carthage pike crosses said run, running thence N. $4^{\circ} 25'$ W. 145.7 feet to a point in said turnpike; thence N. $57^{\circ} 19'$ E. 364 feet to a stone; thence N. $57^{\circ} 47'$ E. 45.5 feet to a stake; thence N. $58^{\circ} 39'$ E. 63 feet to a stone; thence N. $60^{\circ} 44'$ E. 66 feet to a stake; thence N. $62^{\circ} 21'$ E. 66 feet to a stake; thence N. $63^{\circ} 58'$ E. 66 feet to a stone; thence S. $28^{\circ} 14'$ E. 38.4 feet to the center of Ross Run; thence down the center of said run the following courses and distances: S. $47^{\circ} 34'$ W. 60.7 feet; S. $57^{\circ} 43'$ W. 100.2 feet; S. $49^{\circ} 12'$ W. 297.8 feet; S. $39^{\circ} 5'$ W. 120.1 feet; S. $49^{\circ} 43'$ W. 67.3 feet; S. $74^{\circ} 26'$ W. 105.7 feet to the place of beginning, containing 1.79 acres more or less.

To have and to hold the same with the appurtenances to the same

belonging to the said Charles H. Kilgour, his heirs and assigns for ever as fully and as completely as I, the said Philip B. Spence, special commissioner, by virtue of said proceedings, orders, etc., and of the statute in such case made and provided, might or should convey the same.

In witness whereof, I have hereunto set my hand and seal at Cincinnati, Ohio, this 20th day of May, A. D. 1898.

PHILIP B. SPENCE,
Special Commissioner.

Signed, sealed and acknowledged in the presence of:

THOMAS H. KELLEY.
CHARLES FOLLETT.

(Duly acknowledged.)

254 Received for record October 11th, 1898, at 2:55 p. m.
Recorded October 13th, 1898, Book No. 825, page 272. John
Hagerty, Recorder.

EXHIBIT 9-A.

Entry—Journal 4, Page 338.

Decree for Sale.

(Entered February 14, 1898, in Case No. 4859, United States Circuit Court.)

This cause came on to be heard upon the original and the amended and supplemental bills of complaint of The Louisville Trust Company, trustee, and also upon the answers of the various defendants herein, among others, W. A. Goodman, trustee, and upon the intervening petitions of the said W. A. Goodman, trustee, and the responsive pleadings thereto, and upon the intervening petition of The Columbia Finance & Trust Company, trustee, and the responsive pleadings thereto; and the court having heard argument of counsel and being now advised it is adjudged, ordered and decreed as follows:

1. That at the time of the institution of this action and ever since, The Louisville Trust Company, trustee, was, has been and is a citizen and resident of the state of Kentucky, being a corporation duly created by and organized under the laws of that state; and the defendant, The Cincinnati Inclined Plane Railway Company, was, has been and is a citizen and resident of the state of Ohio and of the Southern District and Western Division thereof, being a corporation duly created by and organized under the laws of the state of Ohio, and having its principal place of business in the city of Cincinnati. That after the property hereinafter dealt with and ordered to be sold had, under due and regular process of this Court, *has* placed in the hands of a receiver, there was filed herein the intervening petition of the said W. A. Goodman, trustee, and also

the intervening petition of The Columbia Finance & Trust Company, trustee.

2. That heretofore, to-wit, on January 1, 1879, The Cincinnati Inclined Plane Railway Company, under due authority of law and by consent, order and direction of its stockholders and board of directors, executed and delivered to Henry Peachey and W. A.

Goodman, as trustees, its certain deed of trust whereby it
255 conveyed to the said trustees certain property therein described to secure an issue of bonds of the said mortgagor, The Cincinnati Inclined Plane Railway Company, 125 in number, each in the sum of \$1,000, payable twenty years after said date, payable semi-annually, at the rate of 7 per centum per annum; all of which bonds were duly executed and issued and have come into the hands of bona fide holders for value and are still outstanding. That the said Henry Peachey has long since died, leaving the said W. A. Goodman as the surviving trustee and entitled to all of the rights and subject to all of the duties and responsibilities imposed upon the said two trustees by the said deed of trust, and this being the same deed of trust as is mentioned in the intervening petition of the said W. A. Goodman, trustee, herein, and also in his answer herein.

3. That heretofore, to-wit, on or about January 1, 1889, the said Cincinnati Inclined Plane Railway Company did, by the consent and under the authority and direction of its stockholders and its board of directors, and in pursuance of law, make, execute and deliver to the complainant, The Louisville Trust Company, trustee, its deed of trust, whereby it conveyed to the said Louisville Trust Company, trustee, certain property therein described and property to be thereafter acquired, all as set forth in the said deed of trust filed herein with the bill of complaint. That the same was given to secure an issue of bonds of the Cincinnati Inclined Plane Railway Company in the sum of \$500,000, each of said bonds being in the sum of \$1,000, dated January 1, 1889, and due and payable January 1, 1914, with interest at the rate of 6 per centum per annum, payable semi-annually. That of said bonds 375 amounting to \$375,000, were, by the said Cincinnati Inclined Plane Railway Company duly executed and delivered and have been sold and have come into the hands of and are now held by bona fide purchasers for value; the other 125 of said bonds of \$1,000 each, amounting to \$125,000, being still held by the said complainant, The Louisville Trust Company, trustee, and not having been disposed of by it.

4. That by deed of trust executed the 28th day of March, A. D. 1891, the said Cincinnati Inclined Plane Railway Company did, under authority of its board of directors and stockholders, execute and deliver to the said Columbia Finance & Trust Company a certain
deed of trust filed with and herein set up by said trustee in
256 its intervening petition herein for the purpose of securing a certain issue of preferred stock, which is now outstanding, to the amount of \$150,000.

5. That the interest on the said \$125,000 of bonds secured by the deed of trust to the said W. A. Goodman, trustee, was paid down to

the installment of interest which fell due July 1, 1897, but that no part of the installment of interest which fell due that day has been paid; nor has any part of the installment of interest which fell due January 1, 1898, been paid, but each of said installments, amounting to the sum of \$4,375, with interest from the respective due dates, are still unpaid. Other installments of interest will fall due July 1, 1898, and January 1, 1899, and the principal will be due at said last date.

6. That the interest due upon the \$375,000 of bonds issued and outstanding under the deed of trust to The Louisville Trust Company, trustee, has been paid down to the installment which fell due January 1, 1897; that no part of that installment of interest has ever been paid, and that it amounts to the sum of \$11,250; that a similar installment fell due July 1, 1897, amounting to the same sum, to-wit, \$11,250; that in pursuance to the said deed of trust, which, among other things, provided that if any installment of interest should not be paid when it should become due and payable and demand therefore should have been made, and such default should continue for a period of ninety days, the said trustee, the complainant, upon the request of the holders of one-half of said bonds then outstanding should declare the principal of said bonds to be due, and it should thereupon become due, anything in the said bonds to the contrary notwithstanding—a request was made by the holders of more than one-half of said \$375,000 of bonds, to-wit, by the holders of \$355,000 thereof, and demand was duly made and default had duly continued for the said period; and that thereupon the said bonds were declared to be due and have been since August 31, 1897, the time when such demand for their maturity was made; and there is now due on account of said bonds not only the two interest installments above mentioned, but also the sum of \$375,000, with 6 per cent. interest from July 1, 1897.

7. In order to secure the payment of the said amounts so due and to become due to the holders of bonds which *which* were issued under and secured by the deed of trust to W. A. Goodman, trustee, there belongs to and is hereby adjudged to the said W. A. Goodman, trustee, a lien prior and superior to all others upon the following described property of The Cincinnati Inclined Plane Railway Company, viz., its line of railway from Main and Liberty streets north to the inclined plane; the inclined plane, with all of its machinery, appurtenances and improvements, and the line of railway from the summit of the inclined plane to the entrance to the Zoological Garden at Erkenbrecher avenue, the said railway being more particularly described as follows: The electric street railroad beginning at Liberty street, on Main street, in the City of Cincinnati; thence north by double track to foot of the inclined plane; thence over the inclined plane, including the said inclined plane as aforesaid, by double tracks to the head thereof; thence north on Main or Locust street by double tracks to Mason street; thence eastwardly on Mason street by double tracks to Auburn avenue; thence north on Auburn avenue by single track to its intersection with Vine street; thence north on Vine street by double tracks to the en-

trance of the Zoological Garden at Erkenbrecher avenue. Also all poles, wires and other appliances necessary or convenient to the operation thereof; also all machinery and appliances in the power house at the head of the inclined plane, known as power house No. 1, and including, among other things four boilers, two engines for running the dynamos, six dynamos, two engines for operating the inclined plane, two old boilers under the plane, and the necessary steam pipes, shafting, bolts, connections and other machinery for a complete electric generating station and inclined plane power plant; and the trucks used upon the said inclined plane, and also the following real estate, viz:

(a) Lot 33, as numbered on the recorded plat made by Salmon P. Chase, trustee of Greenberry Dorsey, fronting on the north side of Mulberry street and extending back to Miami street. This lot was conveyed by several deeds shown in Nos. 3, 4 and 5 of the exhibit, "Land Titles," filed with the report of J. C. Harper herein.

(b) Also lots 46 and 73 on the Dorsey blue plat, lying along the inclined plane and conveyed by deed shown in No. 5 of the exhibit, "Land Titles," filed with said report.

(c) Also the leasehold estate in lots 82, 83, 84 and 85 on the Dorsey blue plat, conveyed by deeds shown in Nos. 7 and 8 of the exhibit, "Land Titles," filed with said report. Also lot 86 in the same subdivision, which was conveyed by a deed shown in No. 5 of said exhibit.

258 These lots are located at the head of the inclined plane and lie east thereof. Upon portions of lots 84, 85 and 86 are located the boiler room, engine room and repair shops.

(d) Also lots *b* and *d* of the subdivision between the heirs of Alexander McGrew, which lots lie west of the inclined plane, near the top thereof, and are conveyed by deeds shown in Nos. 10 and 11 of said exhibit so filed as aforesaid.

(e) The car barn property on Sycamore street, which is held under leases shown in Nos. 1 and 2 of the exhibit, "Land Titles," and shown on plat No. 2, filed with said report.

(f) Lot No. 60 on the Dorsey blue plat lying east of the inclined plane and extending from Baltimore to Dorsey street, which was conveyed by deed shown in No. 6 of said exhibit.

(g) Lots 20 and 21 in square 67 of Reeder's subdivision of Findlay & Ludlow's subdivision, lying on the west side of the inclined plane, which were conveyed by deed shown in No. 9 of said exhibit.

(h) Lot 32 and part of lots 45 and 46 on the plat made by S. P. Chase, trustee of G. Dorsey, lying west of the inclined plane, conveyed by deeds shown as Nos. 12 and 13 in said abstract; these lots being held by J. W. Gaulbert, trustee, for The Cincinnati Inclined Plane Railway Company.

(i) Also lot *a*, lying at the head of the inclined plane and west thereof, which was conveyed by deed shown as No. 15 in the abstract filed with the said report; this lot standing in the name of H. M. Littell, trustee, who holds it in trust for The Cincinnati Inclined Plane Railway Company.

Also three-elevenths of the rolling stock of the said Cincinnati Inclined Plane Railway Company, which consists of 39 motor cars, each equipped with two 15-horse power Sprague motors. Of these eight are eighteen feet long; twenty-one are sixteen feet long, and ten are fourteen feet long. There is also one sprinkling car, equipped with two 15-horse power Sprague motors; also four horses and two line and work wagons.

8. That The Louisville Trust Company, trustee, has, for the purpose of securing the payment of the outstanding bonds issued under the deed of trust executed to it and the interest thereon, as above set forth, a lien upon the property described in the next preceding paragraph of this decree, second only to that of W. 259 A. Goodman, trustee; and has a lien prior and superior to

all others upon the following described property of the said Cincinnati Inclined Plane Railway Company, viz.: Its line of electric railroad, with all poles, wires and other appurtenances, beginning at the entrance to the Zoological Gardens at Erkenbrecher avenue; thence northwardly on Erkenbrecher avenue, by double tracks, to its intersection with Carthage pike; thence north on Carthage pike, by double tracks, through the Villages of Clifton, St. Bernard, Elmwood and Carthage to the gas house; thence via Ludlow avenue or Carthage pike, by double tracks, to bridge over Mill creek; thence north, by double tracks, over Wayne avenue through the Villages of Hartwell and Lockland to Wyoming avenue; thence east on Wyoming avenue or Benson street, by double tracks, to Lock street in the Village of Lockland.

Also upon the following described real estate, viz.:

A tract of ground at Ludlow Grove upon which power house No. 2 is erected, a description of which is shown in No. 14, of an exhibit called "Land Titles," filed with the report of the said J. C. Harper, and a plat of which property, showing the location of the buildings thereon, is found in plat No. 3, filed with said report. Also all the improvements and appurtenances upon said lot, including power house No. 2, containing three boilers, one 250-horse power Brown-Corliss engine, one 150-horse power Ball engine, five generators with necessary steam pipes, switch-boards, connections and other apparatus for a complete electrical generating station.

Also eight-elevenths of the equipment described in the next preceding clause of this decree:

9. That the Cincinnati Inclined Plane Railway Company or The Columbia Finance & Trust Company, trustee, or any other person holding a lien inferior to the above liens, shall in order to redeem against an enforcement of the lien hereinbefore decreed in favor of W. A. Goodman, trustee, pay to him or into the registry of the court, on or before the 19th day of February, 1898, the sums adjudged to be due under his said deed of trust by clause 5 of this decree, and in order to redeem against an enforcement of the lien in favor of The Louisville Trust Company, trustee, upon the property described in clause 8 hereof, as well as clause 7 hereof, shall pay to the said Louisville Trust Company, trustee, or into the registry of the Court, on or

before the 19th day of February, 1898, the sums adjudged in favor of those holding equity under said deed of trust as set forth in clause 6 hereof.

10. In case the said property hereinbefore adjudged to be in lien as aforesaid is not redeemed in the time and manner aforesaid, the same shall be sold by Philip B. Spence, who is hereby appointed special commissioner to make the sale. The terms of sale shall be cash, and the property shall be sold free of the liens of all parties to this cause. The special commissioner shall advertise the sale for six weeks, by one insertion a week in one or more daily newspapers published in the City of Cincinnati, to be selected in discretion of said commissioner. He shall first offer for sale the property mentioned in clause 8 of this decree, and then offer the property mentioned in both clauses as a whole, and in the event that the property as a whole shall bring more than the aggregate of the separate bids he shall cry off the same to the said purchaser, otherwise the bids made for the separate parcels shall stand. In distributing the proceeds of sale as hereinafter directed, if the property shall be cried off as a whole, as herein directed, it shall be apportioned between the property mentioned in the said two clauses 7 and 8, as indicated by the separate bids, which shall be reported to the Court by the special commissioner for this purpose. No bid shall be received for the property mentioned in clause 7 less in amount than \$90,000, and no bid for property described in clause 8 less in amount than \$187,500.

No person shall be allowed to bid at said sale who shall not have deposited with the special commissioner prior thereto, in a certified check payable to the order of the Clerk of this Court, a sum equal to ten per cent. of the upset price for each parcel upon which he shall bid, and the purchaser shall, in addition to the amount bid by him, assume all liability for any debts or liabilities of the receiver, in tort or contract, which shall not be satisfied by the amount of money remaining in his hands. The commissioner shall deliver said check to the Clerk of this Court to be deposited at once in the registry of the court. The special commissioner shall report his acts to the court.

11. Any party in interest may bid at said sale. The purchaser may assign his bid with the consent of the court. The purchaser shall have the same right to appeal for any decree fixing any lien upon the property purchased by him which would belong to any other party in the cause.

All claims against the receiver, either in tort or in contract, must be filed herein within thirty days after the said sale or they will otherwise be disregarded.

12. The proceeds of the sale of the property described in clause 7 hereof, if it be sold separately, or of the due proportion belonging to said property, if the same is sold as a whole, shall be distributed in the following manner:

First. To pay one-third of the special commissioner's charge for selling the property, and one-third of the advertisement thereof. The fee of said special commissioner shall not exceed five hundred dollars.

Second. To pay the costs of W. A. Goodman, trustee, including such allowances as may be hereafter made to him for his own services or for those of his counsel.

Third. To pay pro rata the principal and interest of the bonds issued under and secured by the deed of trust to him, as hereinbefore set out.

Fourth. To pay the principal and interest of the bonds secured by deed of trust to The Louisville Trust Company, trustee, as hereinbefore set out.

Fifth. The balance shall remain in the registry of the court to be distributed under orders to be hereinafter made.

13. The proceeds of the sale of the property described in clause 8 hereof, or its due proportion of what the property shall bring if sold as a whole, as hereinbefore set forth, shall be distributed as follows:

First. To pay two-thirds of the cost of the commissioner's fee for making the sale and two-thirds of the cost of the advertising the same.

Second. To pay the costs of Louisville Trust Company, trustee, and such sums as may be adjudged in favor of the said Louisville Trust Company, trustee, for its own compensation and for the services of its counsel.

Third. To pay the principal and interest of the bonds outstanding under the deed of trust to it, as hereinbefore set forth, pro rata.

Fourth. Any balance shall remain in the registry of the court to be disposed of as the court may hereafter decree.

Fifth. In case the property is not redeemed as hereinbefore allowed, the special commissioner shall proceed to make the sale without further order, upon the request of W. A. Goodman, trustee, or of The Louisville Trust Company, or the counsel of either of them.

262 The commissioner shall have the right to adjourn the sale, at his discretion, to such time and place as shall seem to him fit, and without further notice than an announcement at the time and place originally fixed of such adjournment.

The sale shall be made upon the premises at the head of the inclined plane, in the City of Cincinnati, O.

14. That as soon as any sale shall have been made by the commissioner in pursuance of this decree, he shall report the same to this court for confirmation, further certifying to the Court the compliance by the purchaser with the conditions prescribed. In case any bid shall be rejected by the Court, the deposit made by the bidder shall be returned. If the bidder shall fail to comply with the conditions of the sale such deposits shall be forfeited and be applied to the expenses of the sale and the costs of this suit and in liquidation of indebtedness in the above mentioned order of priority.

If any bid shall be accepted or confirmed by the Court and all the conditions of sale be fully complied with, and if the person or persons making such bids shall perform all such conditions, and the Court shall accept the same as sufficient for the time being, and when the Court shall say whether the commissioner shall execute to such purchaser or purchasers deeds of conveyance and transfer of all

the property and interest sold by the said commissioner under this decree to such purchaser, and upon the confirmation of such sale and execution of such conveyance or conveyances by the commissioner, the complainant, The Louisville Trust Company, trustee, and the defendants, W. A. Goodman, trustee, and The Columbia Finance & Trust Company, trustee, shall, at the cost of the purchaser or purchasers, in due form convey to the said purchaser or purchasers all their interest as trustees, in and to the said purchaser or purchasers *all their interest as trustees in and to the property sold by said commissioner to the said purchaser or purchasers.*

15. The purchaser may deposit with the Clerk of the Court in payment of the balance of any bid over and above the amount of the deposit the bonds or coupons issued under and secured by said deed of trust to W. A. Goodman, trustee, and said deed of trust to The Louisville Trust Company, trustee, at the face or pro rata value thereof, according to the amount the property shall bring; provided, that in any event the purchaser shall at such time or times as the Court may order, pay in cash into the registry of the Court enough money to satisfy and discharge such sums as are herein or as
263 may by subsequent orders in this cause be declared payable out of such purchase money prior in lien to the said deed of trust of W. A. Goodman, trustee, or the deed of trust to The Louisville Trust Company, trustee, before any distribution is to — made upon such coupons or bonds. But no bonds or coupons secured by the deed of trust to The Louisville Trust Company, trustee, shall be received in payment for the property described in clause 7 hereof (being that on which said Goodman, trustee, has the prior lien) or its due proportion of the purchase money in case the property is sold as a whole, until payment of all the bonds and coupons secured by the deed of trust to W. A. Goodman, trustee, has been provided.

16. This cause is retained for such other and further orders as may be necessary for the settlement of any intervening petition or other matters herein pending, and also for such orders as may be necessary for ascertaining what, if anything, remains due to the holders of the bonds issued under and secured by said deed of trust executed to W. A. Goodman, trustee, and said deed of trust executed to the complainant, as trustee, over and above the amount received by them from the proceeds of the sale herein; and for the purpose of giving judgment therefor, and for examining and passing the accounts of the receiver, and determining his compensation, and making further orders as to his powers and duties, and for proper application of earnings in his hands, and for such other and further purposes as may be necessary to finally end and determine this litigation; and the Court reserves the right to enforce the orders herein, or any subsequent orders in this cause either by withholding any conveyances or delivery of possession to the purchaser or purchasers, or by a resumption of possession after a conveyances or otherwise, as may be deemed expedient.

WM. H. TAFT,
Circuit Judge.

February 12, 1898.

10—600

Order of Sale.

(Issued February 21, 1898.)

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to Philip B. Spence,
 Special Commissioner:

You are hereby commanded, in pursuance of an order of the Circuit Court of the United States, for the Southern District of Ohio aforesaid, made at the February Term thereof, A. D. 1898, in the case of The Louisville Trust Company against The Cincinnati Inclined Plane Railway Company, to proceed without delay, and cause to be advertised, and to sell according to law, the following described property of The Cincinnati Inclined Plane Railway Company. (Here follows same description of property found in decree for sale.)

The terms of sale shall be cash, and the property shall be sold free of the liens of all parties to this cause.

The advertisement of the sale shall be for six weeks, by one insertion a week in one or more daily newspapers published in the City of Cincinnati, to be selected in the discretion of said commissioner.

You shall first offer for sale the property mentioned in clause seven of the decree, being the first part of the property described above, and then offer for sale the property mentioned in clause eight of the decree, being the property last described above; and then offer the property mentioned in both clauses as a whole, and in the event that the property as a whole shall bring more than the aggregate of the separate bids you shall cry off the same to the said purchaser, otherwise the bids made for the several parcels shall stand. In distributing the proceeds for sale, as hereinafter, to-wit: If the property shall be cried off as a whole, as herein directed, it shall be apportioned between the property mentioned in said two clauses, seven and eight, as indicated by the separate bids which you shall report to the Court for that purpose.

No bids shall be received for the property mentioned in clause seven, less in amount than ninety thousand dollars (\$90,000), and no bids for the property described in clause eight, less in amount than one hundred and eighty-seven thousand and five hundred dollars (\$187,500).

265 No person shall be allowed to bid at said sale who shall not have deposited with the special commissioner, prior thereto, a certified check payable to the order of the Clerk of this Court, a sum equal to ten per cent. of the upset price for each parcel upon which he shall bid, and the purchaser, in addition to the amount bid by him, shall assume all liabilities for any debt, or liabilities of the receiver, in tort or contract, which shall not be satisfied by the amount of money remaining in his hands.

The said commissioner shall deliver said check to the Clerk of this Court to be deposited at once in the registry of the Court.

Any party interested may bid at said sale; the person may assign his bid with the consent of the Court; the purchaser shall have the same right to appeal from any decree fixing any lien upon the property purchased by him, which would belong to any other party in this cause.

All claims against the receiver, either in tort or in contract, must be filed herein within thirty (30) days after the sale, or they will otherwise be disregarded.

The said sale shall be made upon the premises at the head of the inclined plane, in the City of Cincinnati, Ohio, and that your proceedings in the premises you make known to our said Circuit Court of the United States, within and for the Southern District of Ohio, according to law, and have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of February, A. D. 1898, and in the one hundred and twenty-second year of the independence of the United States of America.

Attest:

[SEAL.]

B. R. COWEN, *Clerk*,
By ROBERT C. GEORGI, *Deputy*.

And afterwards, to-wit, on the 5th day of May, A. D. 1898, the following report of sale was filed in the Clerk's office of the Court aforesaid, clothed in the words and figures following, to-wit:

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Report of Sale.

United States Circuit Court, Southern District of Ohio, Western Division.

No. 4859.

THE LOUISVILLE TRUST COMPANY, Complainant,
versus

THE CINCINNATI INCLINED PLANE RAILWAY COMPANY, Defendant.

Report of Sale by Special Commissioner.

The undersigned, Philip B. Spence, the special commissioner appointed herein and charged with duty of making sale of the property of the defendant corporation according to the directions contained in a decree entered of record in the above entitled cause in the Circuit Court of the United States in and for the Western Division of the Southern District of Ohio, on the 14th day of February, 1898, respectfully reports to the Court as follows:

Pursuant to said decree notice of the time, place and terms of sale was given by publication of said notice as follows; In the Cincinnati Times-Star, a daily newspaper of general circulation, printed

and published in the City of Cincinnati, in the State of Ohio, on the days following namely: March 1st, March 8th, March 15th, March 22nd, March 29th and April 5th, 1898. The publication of said notice was by one insertion a week and began more than six weeks prior to the time of sale, and said notice was to the effect that said sale would take place upon the premises of the defendant corporation at the head of the Main Street Inclined Plane, in the City of Cincinnati, Ohio, on Thursday, the 14th day of April, A. D. 1898, at 12 o'clock noon of said day; a copy of said notice as published in said newspaper is filed herewith and made part of this report.

After having given said notice in the manner aforesaid in pursuance thereto and in obedience to said decree of said Court in that behalf, the undersigned special commissioner attended in person at said City of Cincinnati, County of Hamilton and State of Ohio, at the head of the Main Street Inclined Plane, upon the premises of The Cincinnati Inclined Plane Railway Company, upon the day appointed and at the hour named in said notice of sale, and in the presence of a number of persons attending said sale and having the opportunity to bid thereat, did then and there at
267 public outcry openly offer and expose to sale upon the terms and conditions of said decree of said Court and said notice of sale:

First. The rights, properties and franchises conveyed in the mortgages foreclosed, and described in clause 7 of the decree, including all that part of the street railway of the defendant corporation, The Cincinnati Inclined Plane Railway Company, situate between the entrance to the Zoological Garden and Liberty street in Cincinnati, together with all real estate belonging to said company, except that on which is located power house No. 2 at St. Bernard, and also three-elevenths of the entire equipment of said defendant corporation, and,

Second. The rights, properties and franchises conveyed in the mortgages foreclosed and described in clause 8 of the decree, including all that part of the street railway of the defendant corporation, The Cincinnati Inclined Plane Railway Company, situated between the entrance to the Zoological Garden and the northern terminus of said railway at Lock street in the Village of Lockland, Hamilton county, Ohio, and eight-elevenths of the entire equipment of said defendant corporation, together with the real estate appurtenant thereto, at St. Bernard, on which is located power house No. 2, and

Third. As an entirety all and singular the rights, properties and franchises conveyed in the mortgages foreclosed and described in clauses 7 and 8 of the decree, including all the street railway of the defendant corporation, The Cincinnati Inclined Plane Railway Company, between Liberty street in Cincinnati and Lock street in the Village of Lockland, in Hamilton county, Ohio, and all its real estate of every description belonging to said company, and all its equipment and all the property embraced or referred to in

said decree. The notice of sale was read at the time and in the hearing of the persons so assembled and is as follows:

(Here follows a copy of the legal advertisement.)

And thereupon J. W. Warrington did bid for said property first offered as aforesaid and described as "First" in said notice of sale the sum of ninety thousand (\$90,000) dollars, and before said bid was made said bidder had deposited with the undersigned special commissioner a certified check payable to the order of B. R. Cowen, Clerk of the United States Circuit Court for the Southern District of Ohio, in the sum of nine thousand (\$9,000) dollars, being
268 ten per cent. of the upset price fixed by the Court upon said property known as parcel No. 1, and no one bid more and that was the highest and best bid.

And thereupon D. Dwyer did bid for said property second offered as aforesaid and described "Second" in said notice of sale the sum of one hundred and eighty-seven thousand five hundred (\$187,500) dollars, and before said bid was made said bidder had deposited with the undersigned special commissioner a certified check payable to the order of B. R. Cowen, Clerk of the United States Circuit Court for the Southern District of Ohio, in the sum of eighteen thousand seven hundred and fifty (\$18,750) dollars, being ten per cent. of the upset price fixed by the Court upon said property known as parcel No. 2, and no one bid more and that was the highest and best bid.

And thereupon Charles H. Kilgour did bid for said property as an entirety, being the property described as "First" and "Second" in said notice of sale, the sum of two hundred and seventy-eight thousand (\$278,000) dollars, and before said bid was made said bidder had deposited with the undersigned special commissioner a certified check payable to the order of B. R. Cowen, Clerk of the United States Circuit Court for the Southern District of Ohio, in the sum of twenty-seven thousand seven hundred and fifty (\$27,750) dollars, being ten per cent. of the upset price fixed by the Court upon said property as an entirety, and no one bidding more, and that being the highest and best bid and more than the aggregate of the separate bids for parcels one (1) and two (2), respectively, the property of The Cincinnati Inclined Plane Railway Company as an entirety was thereupon then and there, at the hour of 12:50 o'clock p. m. of the said day, openly and publicly struck off and sold in accordance with the directions of said decree of sale to Charles H. Kilgour for the sum of two hundred and seventy-eight thousand (\$278,000) dollars. The commissioner returned to the said Warrington and Dwyer their checks. He has deposited the check of the said Kilgour with the Clerk of this Court to be dealt with as the Court may order. He reports as above that the property as a whole brought two hundred and seventy-eight thousand (\$278,000) dollars, and for the purpose of pro rating reports that the property described in clause 7 had for its highest bid ninety thousand (\$90,000) dollars, and that described in clause 8 had for
its highest bid one hundred and eighty-seven thousand five
269 hundred (\$187,500) dollars, and the said special commis-

sioner submits his doings herein for the consideration and further order of this Court.

Respectfully submitted,

PHILIP B. SPENCE,
Special Commissioner.

Cincinnati, May 5th, 1898.

And afterwards, to-wit, on the 5th day of May, A. D. 1898, the following motion was filed in the Clerk's office of the Court aforesaid, clothed in the words and figures following, to-wit:

Motion to Confirm Sale.

Now comes W. A. Goodman, trustee for the first mortgage bondholders, by Follett & Kelley, his counsel, and moves the Court to confirm the report of the sale of the property of the defendant corporation, The Cincinnati Inclined Plane Railway Company, made by Philip B. Spence, special commissioner, under the directions and according to the commands of the decree of sale heretofore entered herein.

2. To order a deed to the purchaser, and
3. To order a distribution of the proceeds of sale.

W. A. GOODMAN,

Trustee, etc.,

By FOLLETT & KELLEY,

His Counsel.

And afterwards, to-wit, on the 7th day of May, A. D. 1898, an entry was made upon the Journal of said Court, clothed in the words and figures, following, to-wit:

Entry, Journal 4, Page 423, Sale Confirmed and Deed Ordered.

This day this cause came on to be heard upon the motion of W. A. Goodman, trustee for the first mortgage bondholders, to confirm the sale made herein on the 14th day of April, 1898, by Philip B. Spence, special commissioner appointed for the purpose by the former order of this Court, and upon producing the report of said special commissioner of said sale, and it appearing that notice of the hearing of the motion to confirm said sale has been given in accordance with the former order of this Court in that behalf, and the Court having fully examined the report of said special commissioner of said sale and his doings in pursuance of said decree of sale, and finding the same correct and in all respects in conformity to law and to the former orders of the Court, and that the amount bid at said sale as reported by said special commissioner in his report of sale to-wit, the sum of two hundred and seventy-eight thousand (\$278,000) dollars, was the highest and best bid for the premises and property, rights and franchises so ordered to be sold by him, and the purchaser, Charles H. Kilgour, having complied

with the requirements of the decree of sale in reference to the deposit of ten per cent of the upset price of the property bid for by him, it is now therefore ordered, adjudged and decreed that said sale be and the same hereby is ratified and confirmed, and all the proceedings of the special commissioner in that regard are hereby approved and confirmed.

It is further ordered by the Court that Philip B. Spence, special commissioner herein, shall by proper instrument in writing convey in fee simple to the purchaser, Charles H. Kilgour, all and singular the premises and property, rights and franchises of the defendant corporation, The Cincinnati Inclined Plane Railway Company, as the same are described in the said decree of sale heretofore entered in this cause by this Court, and all the right, title and interest at law or in equity of all parties to this case in or to the same or any part thereof, and the said purchaser is hereby subrogated to all rights of all lien-holders, parties to this suit, in and to said premises and property, rights and franchises.

And it is further ordered, adjudged and decreed that upon the execution and delivery of said deed all the parties to this cause, and the receiver heretofore appointed herein, shall, and they are hereby directed and required to surrender and deliver possession of all and singular the premises and property, rights and franchises so sold as aforesaid to the said purchaser, or his assigns; and further that said receiver shall thereupon file his final report of his doings as receiver in this cause.

And the Court coming now to make a partial distribution of the funds in the hands of the Clerk of this Court, orders said Clerk to pay to Philip B. Spence, special commissioner, the sum of five hundred (\$500) dollars, in full of his services in making the sale heretofore ordered herein, and as to a further distribution herein, 271 and all other matters, this case is continued.

Provided, however, that the Court hereby reserves the right on failure of the purchaser to comply with the terms of the decree of sale as to payment, and with all the provisions of the decree of confirmation to retake and resell in this cause the said property so sold for the purpose of carrying out the intent and meaning of the decree of sale herein.

And afterwards, to-wit, on the 4th day of June, A. D. 1898, an entry was made upon the Clerk's office of the Court aforesaid, clothed in the words and figures following, to-wit:

Entry, Journal 4, Page 448.

This day came the parties, and it is now ordered, adjudged and decreed as follows:

1. For the time being, the amount coming to each one of the first mortgage bonds with coupons, from July 1st, 1897, and subsequently, is fixed at \$675.50, and

2. To the second mortgage bonds with coupons from 1st day of July, 1897, on, if fixed at \$459.56. The purchaser, Charles H.

Kilgour, produced in Court 47 of the first mortgage bonds and 369 of the said first mortgage bonds, and 369 of the said second mortgage bonds, each having the coupons on as indicated above. He has heretofore paid into Court the sum of \$27,800.00; he now pays into Court in cash the sum of \$48,919.10, which with the value of the said first and second mortgage bonds as above produced by him, makes the payment by him in full of his purchase money, \$278,000.00.

The said bonds are delivered to the Clerk herein, who is ordered to stamp them with the credit as above and to return them to the said purchaser.

3. The Clerk of the Court is ordered forthwith to deliver to the said Charles H. Kilgour, the special master's deed to the property sold herein, and the receiver, Brent Arnold, is ordered to deliver to the said Kilgour forthwith all the rights, properties and franchises purchased by the said Kilgour herein, and now in the possession of the said Brent Arnold as receiver.

4. The Clerk of the Court is directed, out of the funds in the registry in this case, to pay to The Louisville Trust Company the sum of \$14,000.00 as follows:

272 \$5,000.00 on account of the allowance made to A. C.

Humphrey, whereof it shall pay to him \$2,000.00, and

\$5,000.00 on account of the allowance made to St. John Boyle, whereof it shall pay to him \$2,000.00, and

\$3,000.00 on account of the moneys heretofore paid by it to E. A. Ferguson, and,

\$1,000.00 on account of the allowance made to it.

And the Clerk shall also pay to Follett & Kelley the sum of \$2,750.00 allowed to them herein, and to W. A. Goodman, trustee, the sum of \$500.00, and to Miller Outcalt, the sum of \$500.00, and to Thornton M. Hinkle the sum of \$350.00, and to E. A. Ferguson the sum of \$2,000.00 on account of the allowances made to them respectively herein.

(Duly verified.)

EXHIBIT 10-A.

Deed from Charles H. Kilgour to the Mill Creek Valley Street Railroad Company.

Know All Men by These Presents:

That, whereas, Charles H. Kilgour, the grantor herein, under and pursuant to arrangement in that behalf previously made, advanced the money to purchase and at the sale hereinafter mentioned purchased the electric street railway property hereinafter described for the use and benefit of The Cincinnati, Hamilton, Middletown & Dayton Street Railway Company, the name of which company has since been changed to The Mill Creek Valley Street Railway Company; one of the conditions of advancing said purchase money was that said Kilgour should be repaid in preferred stock

subject to a provision, however, that the said railroad company, its successors or assigns, should never issue any bonds or other obligations to be secured by mortgage or pledge of any kind, either of its property or income or both, except by and with the previous written consent of the owners of at least ninety per centum in par value of the outstanding preferred stock of said company; the said sale was recently made through special commissioner under the certain decree of sale in case of The Louisville Trust Company against The Cincinnati Inclined Plane Railway Company and others, in the United States Circuit Court for the Southern District of Ohio, Western Division, No. 4859.

273 Now, therefore, said Charles H. Kilgour, in consideration of the premises and of the sum of one dollar and also of certain preferred stock of said company to him paid and delivered by The Mill Creek Valley Street Railroad Company, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey to said The Mill Creek Valley Street Railroad Company, its successors and assigns forever, such and such only, of the property real and personal, below described, together with such franchises, all by the same title and not otherwise, as he received and obtained through said sale, to-wit:

The line of electric street railroad now in place in Hamilton county, Ohio, together with all poles, wires and other appurtenances, beginning at the northernmost point in the Carthage pike, which is intersected by the corporation line of Cincinnati; thence north on Carthage pike by double track through the Villages of St. Bernard, Elmwood and Carthage to the gas house; thence via Ludlow avenue or Carthage pike by double track to bridge over Mill Creek; thence north by double track over Wayne avenue, through the Villages of Hartwell and Lockland to Wyoming avenue; thence east by double track to Lock street, in the Village of Lockland.

Real Estate. The following described real estate, situate at Ludlow Grove, Hamilton county, Ohio, upon which power house No. 2 is erected, the said real estate being in Section 11, Mill Creek township, Hamilton county, Ohio, and being the same premises conveyed to The Cincinnati Inclined Plane Railway Company by the B. & O. S. W. Railroad Company, by deed dated September 19th, 1891, and recorded in Deed Book 745, page 238, of the Deed Records of Hamilton County, Ohio, together with all the improvements and appurtenances upon said lot, said lot being more particularly described as follows: Beginning at a point in the center of the creek called Ross Run, distant S. 4 deg. 25 min. E. 17.2 feet from the center of the face of the north abutment of the bridge upon which the Carthage pike crosses said run; running thence N. 57 deg. 19 min. E. 364 feet to a stone; thence N. 57 deg. 47 min. E. 45.5 feet to a stake; thence N. 58 deg. 39 min. E. 63 feet to a stone; thence N. 60 deg. 44 min. E. 66 feet to a stake; thence N. 62 deg. 21 min. E. 66 feet to a stake; thence N. 63 min. 58 deg. E. 66 feet to a stone; thence S. 28 deg. 14 min. E. 38.4 feet to the center of Ross Run; thence down the center of said Run the following courses and distances, S. 47 deg. 34 min. W. 60.7 feet; S. 57 deg. 43 min. W. 100.2 feet; S. 49 deg. 12 min. W.

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297.8 feet; S. 39 deg. 5 min. W. 120.1 feet; S. 49 deg. 43 min. W. 67.3 feet; S. 74 deg. 26 min. W. 105.7 feet to the place of beginning, containing 1.79 acres, more or less.

Rolling Stock. Also all of the rolling stock of the said The Cincinnati Inclined Plane Railway Company, which consists of thirty-nine motor cars, each equipped with two 15-horse power Sprague motors; of these, eight are eighteen feet long, twenty-one are sixteen feet long, ten are fourteen feet long; one sprinkling car equipped with two 15-horse power Sprague motors. Also two horses and two line and work wagons, together with all wheels, motors or parts of motors, and any and all interchangeable parts or material in the rough, or supplies on hand, to be used in and upon said cars and motors.

And all the estate title and interest of the said Charles H. Kilgour, either in law or in equity, of, in and to the said premises: Together with all the privileges and appurtenances to the same belonging, and all the rents, issues and *and* profits thereof.

To have and to hold the same to the only proper use of the said The Millcreek Valley Street Railroad Company, its successors and assigns forever.

In witness whereof, the said Charles H. Kilgour (unmarried), has hereunto set his hand this 10th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

C. H. KILGOUR.

Signed and acknowledged in presence of:

J. D. MEEKER,

J. B. BOUTET.

(Duly certified).

STATE OF OHIO,

Hamilton County, ss:

Received for record October 11, 1898, at 11 a. m.; recorded in Deed Book, No. 824, page 325, October 14, 1898.

JOHN HAGERTY,
County Recorder.

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EXHIBIT 11-A.

Ordinance No. 1039, to Provide for the Extension of The Cincinnati Inclined Plane Railway from the Northern Terminus of the Carthage Pike, over Main Street and Lockland Avenue to the North Corporation Line of the Village of Carthage.

Be it ordained by the Council of the Village of Carthage, Hamilton County, Ohio, as follows:

SECTION 1. That, whereas, application has been made in due form, as required by law, by The Cincinnati Inclined Plane Railway Company, for permission to extend its tracks over and along Main street and Lockland avenue, of the said Village, from the northern termi-

nus of the Carthage pike therein, to the north corporation line of said village, and to construct its railway and operate its cars over and along said streets by means of electricity, together with all necessary turnouts, switches, appendages and appurtenances incident to the proper operation of its railway system, and,

Whereas, there has been filed with this Council the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on each of said streets, consenting and agreeing to said extension and construction by this Council, and,

Whereas, such extension is deemed beneficial to the public;

Now, therefore, permission is hereby granted to the said The Cincinnati Inclined Plane Railway Company to use and occupy, by double tracks, with the necessary switch connection at the north end of said tracks, and with appendages and appurtenances incident to the proper operation of its electric railway system, Main street and Lockland avenue commencing at the northern terminus of the Carthage pike in said village and over and along said Main street and Lockland avenue, to the north corporation line of said village.

Said extension is granted and said tracks to be laid upon the following terms and conditions, to-wit:

First. Said tracks shall occupy the center of the streets, 276 and shall be placed as near together as practicable, allowing for the safe and convenient passage of cars thereon.

Second. Said company shall lower its tracks on said street and avenue wherever necessary to conform to the established grade of said street, to the satisfaction of the engineer of the village.

Third. The ties shall be laid in not less than six inches of broken stone well packed.

Fourth. The rails to be used shall be of the same pattern as now laid on Vine street in the City of Cincinnati, between Molitor and St. Clair streets, and known as Section B 52 No. 108, being the Johnson Girder 52 lb. rail.

Fifth. Said company shall use in said extension iron poles or neatly painted octagonal wooden poles, and replace the present wooden poles now in use with iron poles or neatly painted octagonal wooden poles as fast as the present wooden poles give out through the entire village.

Sixth. That said company shall run sufficient cars to accommodate the traffic through without change, from the corner of Fifth and Walnut streets, in the City of Cincinnati to the north corporation line of said village; provided, however, that said cars between the hours of six o'clock a. m. and 6 o'clock p. m. shall be run at intervals not to exceed eight (8) minutes, and between the hours of 6 o'clock p. m. and 12 o'clock p. m. shall be run at intervals not to exceed fifteen (15) minutes. And provided, further, that the first car shall leave the north corporation line of said village not later than 6 a. m. and the last through car shall leave the corner of Fifth and Walnut streets in Cincinnati not earlier than eleven (11) o'clock p. m.

Seventh. That the charge for transportation of passengers over

the line of said company, from the corner of Fifth and Walnut streets in the City of Cincinnati to any point in the Village of Carthage, shall not exceed ten (10) cents cash fare, and from the main entrance of the Zoological Garden in the City of Cincinnati to any point in said village, shall not exceed five cents cash fare, and for children under the age of three (3) years, not to exceed one half the above rates may be charged. And said company shall place on sale at convenient and accessible places tickets in package or book form, good for transportation in either direction from the corner of Fifth and Walnut streets in the City of Cincinnati to the north corporation line of Carthage, twelve (12) for one dollar (\$1), said tickets to be good until used on all cars of the said company and in the hands of any person. And the above prescribed rates

277 shall be conspicuously posted in all cars of the company.

Provided, that the Marshal, or any other police officer of said village, when in full uniform and in the discharge of official duties shall be permitted to ride on the cars of the company without charge. And provided, further, that the rates of fare between Fifth and Walnut streets in Cincinnati and the north corporation line of Carthage, shall at no time exceed the rates of fare between said point in Cincinnati and any point north of and beyond the north corporation line of Carthage.

Eighth. That in lowering the tracks to conform to the established grade, and in making the extension of tracks as hereinbefore provided, said company shall cause to be laid underneath the ties of all of said tracks a layer of broken stone, no stone to be less than 2½ inches, nor greater than 4 inches in greatest diameter. Said layer of stone to be thoroughly tamped under the ties, and when tamped must have a thickness of not less than six (6) inches. Said company shall replace and restore the said portions of said streets in good order and condition with broken stone and at its own expense; and all the said work shall be under the supervision and subject to the directions and approval of the engineer employed by the Village of Carthage and Village Council.

Ninth. The said company shall pay the treasury of said village the sum of \$50.00 on the first Monday of September, 1894, and \$50.00 on the first Monday of March and the first Monday of September of each succeeding year thereafter, which said sum of money, when received and paid into the treasury of the village, shall be credited to the Lockland avenue repair fund, and shall be applied only by said village in making the necessary repairs to said avenue, and for no other purpose.

Tenth. Within thirty days after the passage of this ordinance said company shall file its written acceptance of the terms and conditions of the same, and give a bond satisfactory to the Council (and to the village Solicitor, as to form) in the sum of twenty-five hundred dollars (\$2,500.00), conditioned for the faithful compliance of said company with all the terms and conditions of this ordinance, and to save the village harmless from any and all claims by reason of the construction and operation of this extension.

SEC. II. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

(Signed)

J. L. ORBISON, *Mayor*.

(Signed) L. HALL, *Clerk*.

Passed August 7, 1894.

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EXHIBIT 12-A.

August 16, 1894.

To the Honorable the Mayor and Council of the Incorporated Village of Carthage.

GENTLEMEN: This is to advise you that in compliance with the terms of an ordinance entitled an ordinance No. — "To provide for the extension of the Cincinnati Inclined Plane Railway from the northern terminus of the Carthage pike, over Main street and Lockland avenue to the north corporation line of the Village of Carthage." The Cincinnati Inclined Plane Railway Company hereby accepts the terms and conditions of said ordinance.

Respectfully,

THE CINCINNATI INCLINED
PLANE RAILWAY CO.

(Signed)

Per H. P. BRADFORD, *Gen'l M'gr*.

Know All Men by These Presents:

That the Cincinnati Inclined Plane Railway Company as principal, and Oliver Kinsey, as surety, are held and firmly bound unto the The Incorporated Village of Carthage in Hamilton County, Ohio, in the sum of twenty-five hundred dollars for the payment of which well and truly to be made the obligors hereto jointly and severally bind themselves, their successors, heirs and assigns firmly by these presents.

Signed at Cincinnati, Ohio, this 17th day of August, 1894.

The condition of the above obligation is such, that,

Whereas, on the 7th day of August, 1894, the Council of the Incorporated Village of Carthage duly passed an ordinance entitled ordinance No. — "To provide for the extension of The Cincinnati Inclined Plane Railway from the northern terminus of the Carthage pike over Main street and Lockland avenue to the north corporation line of the Village of Carthage," and

Whereas, by the tenth paragraph of said ordinance it is provided that

Tenth. Within thirty days after the passage of this ordinance, said company shall file its written acceptance of the terms and conditions of the same, and give a bond satisfactory to the Council (and
279 to the village Solicitor as to form), in the sum of twenty-five hundred dollars (\$2,500.00), conditioned for the faithful compliance of said company with all the terms and conditions of this ordinance, and to save the village harmless from any and all claims by reason of the construction and operation of this extension,
and

Whereas, said company has filed its written acceptance of the terms and conditions of said ordinance,

Now, therefore, if the said The Cincinnati Inclined Plane Railway Company shall faithfully comply with all the terms and conditions of said ordinance and save the Village of Carthage harmless from any and all claims by reason of the construction and operation of said extension, then this obligation to be void.

THE CINCINNATI INCLINED
PLANE RAILWAY CO.,

(Signed) By H. P. BRADFORD,
General Manager.

(Signed) OLIVER KINSEY.

Attest:

J. D. DEWITT.

Approved as to form:

S. B. HAMMEL, *Solicitor*.

August 21, 1894.

EXHIBIT 13-A.

CARTHAGE, O., Jan. 2d, '99.

Mr. Wagenhals, Gen'l Manager M. V. St. R. R. Co.

DEAR SIR: The following is a statement of street assessment received from Cincinnati Inclined Plane R. R. Co.:

Sept. 3d, '94.....	\$50.00
April 5, '95.....	50.00
Sept. 5, '95.....	50.00
March 5, '96.....	50.00
Sept. 18, '96.....	50.00
March 5, '97.....	50.00
Sept. 9, '97.....	50.00
March 14, '98.....	50.00
Total.....	\$400.00

Respectfully yours,

WM. WIEHE,
Treasurer Village of Carthage.

COUNTY COMMISSIONERS' OFFICE,
HAMILTON COUNTY, OHIO,
CINCINNATI, O., July 3, 1899.

This is to certify that The Cincinnati Inclined Plane Railway Company and its receiver have paid all moneys due the county

from said railway company under the resolution of the Board of County Commissioners, dated March 23, 1889, granting it permission to occupy the Carthage turnpike from at or near its intersection with Ludlow avenue to the northern terminus of said pike, near the county fair grounds, with a double track electric street railroad system.

[SEAL.]

GEO. C. ZIMMERMANN,
Clerk Board of Hamilton County Commissioners.

EXHIBIT 15-A.

Agreement Between Charles H. Kilgour and The C., H., M. & D. R. R. Co.

Agreement, made this fourth day of June, 1898, between Charles H. Kilgour, of Cincinnati, Ohio, of the first part, and The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, a corporation organized under the laws of the state of Ohio, of the second part.

The first party purchased certain property at the sale recently made through special commissioner under the certain decree of sale in the case of The Louisville Trust Company vs. The Cincinnati Inclined Plane Railway Company et al, in the United States Circuit Court of the Southern District of Ohio, Western Division, No. 4859, a part whereof was in said decree described substantially as follows, to-wit:

"The line of electric street railroad now in place in Hamilton county, Ohio, together with all poles, wires and other appurtenances, beginning at the entrance of of the Zoological Garden at Erkenbrecher avenue; thence northwardly on Erkenbrecher avenue by double track to its intersection with Carthage pike; thence north on Carthage pike by double tracks through the Villages of Clifton, St. Bernard, Elmwood and Carthage to the gas house; thence via Ludlow avenue or Carthage pike by double track to bridge 281 over Mill Creek; thence north by rouble tracks over Wayne avenue through the Villages of Hartwell and Lockland to Wyoming avenue; thence east on Wyoming avenue or Benson street by double tracks to Lock street in the Village of Lockland."

"Real Estate. Also the following described real estate situate at Ludlow Grove, Hamilton county, Ohio, upon which power house No. 2 is erected, the said real estate being in Section 11, Mill Creek township, Hamilton county, Ohio, and being the same premises conveyed to The Cincinnati Inclined Plane Railway Company by the B. & O. S. W. Railroad Company by deed dated September 19, 1891, and recorded in Deed Book 745, page 238, of the Deed Records of Hamilton County, Ohio, together with all the improvements and appurtenances upon said lot, including power house No. 2, containing three boilers, one 254-horse power Brown-Corliss engine, one 15-horse power Ball engine, five generators, with necessary steam pipes,

switch boards, connections and other apparatus for a complete electrical generating station."

"Rolling Stock. Also all of the rolling stock of the said The Cincinnati Inclined Plane Railway Company, which consists of thirty-nine motor cars, each equipped with two 15-horse power Sprague motors. Of these eight are eighteen feet long, twenty-one are sixteen feet and ten are fourteen feet long. One sprinkling car equipped with two 15-horse power Sprague motors. Also two horses and two line and work wagons, together with all wheels, motors or parts of motors and any and all interchangeable parts or material in the rough or supplies on hand to be used in or upon said cars or motors."

The confirmation of said sale has been made, though the deed therefor has not as yet been delivered. When the deed is delivered to the first party and accepted by him, he will sell and convey to the second party by the same title he shall obtain, all of the property, real and personal, above specifically described, which he shall receive, together with such franchises as he shall obtain under said sale excepting, however, the portion of the road, tracks, poles, wires and franchise lying and being between the entrance to the Zoological Garden and the northernmost point in the Carthage pike, which is intersected by the corporation line of Cincinnati, for the consideration of two hundred and fifty thousand (\$250,000) dollars. Said consideration may be paid and will be accepted in

282 preferred stock, at par, of said second party which shall bear a cumulative dividend of five per centum (5%) per annum to be payable out of earnings and shall be preferred over common stock in any distribution of assets as well as in dividends, and shall be part of a total issue of not exceeding one million dollars (\$1,000,000) par value of that character of stock; the proceeds of sale of two hundred thousand (\$200,000) dollars of the remainder of such issue are as far as necessary to be used properly to place in first class condition and to equip with first class power plant, rolling stock, etc., the road and property so to be conveyed (and also the portion to be leased as below stated) by said first party to said second party, and to extend said road to Reading; the remaining five hundred and fifty (\$550,000) thousand dollars to be issued and sold only for building and equipping in a first class manner the second party's electric street railroad from the junction with the street railroad to be conveyed as aforesaid to the City of Hamilton, Butler county, Ohio; provided, however, and this agreement is made upon the express condition that such preferred stock shall be issued under and subject to the following stipulations, which shall be printed in plain and legible type on each and all of said certificates which said second party shall ever issue, either as original certificates or as transfer certificates, to represent any portion of said one million (\$1,000,000) dollars par value of preferred stock, to-wit: That in the event that said second party, its successors or assigns, should ever deem it necessary to issue any bonds or other obligations to be secured by mortgage or pledge of any kind either of its property or income, or both, the same shall not be

executed or delivered until or unless the holders of at least ninety (90%) per cent. par value of said certificates in writing shall approve of such action.

As to the portion of the street railroad, poles, wires, franchises, etc., lying and being between the entrance to the Zoological Garden and the northernmost point in the Carthage pike which is intersected by the corporation line of Cincinnati, it is agreed that as part of the consideration aforesaid the first party will grant by lease containing the usual covenants to said party the right to use the same for street railroad purposes under such title and franchise as the first party shall obtain through said commissioner's sale or through any source hereafter, without any limitation as to time, but, nevertheless, subject to the following conditions, to-wit:

283 (1). That if the second party shall at any time hereafter apply for in writing or obtain the right to extend the street railroad so to be conveyed to it into any portion of the territory of Cincinnati as now constituted, no matter whether the limits of said city be hereafter changed, or not, the said lease shall forthwith cease and determine and the second party shall no longer operate any cars upon any part of such leased road;

(2). That said second party, for and during the continuance of said lease, shall at its own expense place and keep in good repair and condition the entire property so leased, except that The Cincinnati Street Railway Company shall bear its equitable proportion of same in case it elects to use the property jointly and also pay its proportion of all taxes, assessments and charges of every kind which may be imposed or may otherwise accrue thereon or any part thereof; but that if at any time by reason of hostile legislation of the City of Cincinnati or by reason of oppressive assessments, license fees or charges on road's income, or otherwise imposed by said city, the second party shall find it unprofitable to operate said leased road and property, then, and in that event, it shall have the right to cease such operation and to surrender the lease and the term created thereunder to the first party, his heirs or assigns; and

(3). That The Cincinnati Street Railway Company, its successors and assigns, shall at its or their option have the right and privilege, which shall be expressly reserved in its and their favor in said lease, jointly to use forever and without rental, so much of said leased road and property as lies between the entrance to the Zoological Garden and Mitchell avenue, and to operate cars over the same in both directions for the purpose of reaching either Chester Park or Spring Grove Cemetery, or other points in that vicinity; and in case such joint use is made, the said company, its successors or assigns, shall pay an equitable proportion of the cost of constructing and maintaining the road and property and such portion of taxes and assessments as may be levied on that portion of the line so used jointly.

If the lease aforesaid is surrendered, the first party shall pay the reasonable cost of any betterments which the second party shall have placed on the leased road, either in the way of track or overhead work or construction, less, however, ten per centum (10%) per annum of

284 such cost for the number of years between the date, or dates, of incurring the cost to the time of such surrender, but no payments shall be made for any expense incurred more than ten (10) years to such surrender of said lease, nor for betterments, if any, which may have been placed thereon at the expense of The Cincinnati Street Railway Company.

The second party consents that the first party shall transfer and assign all the title, rights and interests which shall remain to him in any part of said leased road and property to said Cincinnati Street Railway Company. The second party shall pay all the taxes, assessments, etc., beyond the north corporation line of the city of Cincinnati.

It is mutually agreed that all the stipulations and covenants herein contained, and all the rights and privileges herein mentioned or provided for, shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the first party, and to the successors and assigns of the second party, the same as if these words were set out specifically in each stipulation and covenant of the parties respectively.

In witness whereof, said Charles H. Kilgour has hereunto, and to a duplicate hereof, subscribed his name; and said The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, acting by its president, L. C. Weir, and its secretary, O. B. Brown, thereunto duly authorized, has hereunto, and to a duplicate hereof, caused its corporate name to be subscribed and its corporate seal to be affixed on the date first above written.

(Signed)

C. H. KILGOUR.

(Signed)

THE CINCINNATI, HAMILTON, MIDDLETOWN & DAYTON STREET RAILROAD COMPANY,

[SEAL.]

By L. C. WEIR, *President*.
O. B. BROWN, *Secretary*.

Lease from Charles H. Kilgour to the Mill Creek Valley Street R. R. Co.

This lease, made this 10th day of October, A. D. 1898, between Charles H. Kilgour, lessor, and The Mill Creek Valley Street Railroad Company, lessee, witnesseth: That whereas, said lessor, under and pursuant to arrangement in that behalf previously made, advanced the money to purchase, and at the sale hereinafter mentioned, purchased the electric street railway property hereinafter described, subject to an obligation to lease the same to The Cincinnati, Hamilton, Middletown & Dayton Street Railway Company, the
285 name of which company has since been changed to The Mill Creek Valley Street Railroad Company, and subject also to a provision requiring certain covenants hereinafter recited to be contained in said lease; now, therefore, the said lessor, in consideration of the premises and of the rents and covenants hereinafter contained by said lessee and its successors to be paid and performed, does hereby

grant, demise and lease to the said lessee, its successors and assigns, the electric street railway property situate in the city of Cincinnati, county of Hamilton, State of Ohio, and described as follows, to-wit: That portion of the street railroad, poles, wires, franchises, etc., lying and being between the entrance to the Zoological Garden in said Cincinnati and the northernmost point in the Carthage pike, which is intersected by the corporation line of Cincinnati, being a portion of the electric street railway property which formerly belonged to The Cincinnati Inclined Plane Railway Company, and which was sold among other property to said lessor through special commissioner under the certain decree of sale in the case of The Louisville Trust Company against The Cincinnati Inclined Plane Railway Company and others, in the United States Circuit Court for the Southern District of Ohio, Western Division, No. 4859.

To have and to hold the same with the appurtenances unto the said lessee, its successors and assigns, from the 4th day of June, A. D. 1898, for and during the full term of ninety-nine (99) years next ensuing from the date last aforesaid and renewable forever; subject, nevertheless, to the following conditions, to-wit:

(1). That if the said lessee, its successors or assigns, shall at any time hereafter apply for in writing or obtain the right to extend any part of the street railroad owned or operated by it, its successors or assigns, into or through any portion of the territory of Cincinnati, as now constituted, no matter whether the limits of said city be hereafter changed or not, then this lease shall forthwith cease and determine, and the lessee, its successors and assigns, shall no longer operate any cars upon any part of such leased road;

(2). The said lessee, its successors and assigns, for and during the continuance of this lease, shall at their own expense place and keep in good repair and condition the entire property so leased, except that The Cincinnati Street Railway Company, its successors or

286 assigns (which as hereinafter agreed shall have the right to use such leased property jointly with said lessee, its successors or assigns), shall bear its equitable proportion of the same in case it shall elect so to use said leased property, and shall also pay its proportion of all taxes, assessments and charges of every kind which may be imposed or may otherwise accrue upon said leased property or any part thereof; but if at any time, by reason of hostile legislation of the city of Cincinnati or by reason of oppressive assessments, license fees or charges on the income of the road, or otherwise imposed by said city, the said lessees shall find it unprofitable to operate said leased road and property, then and in that event it shall have the right to cease such operation and to surrender this lease, and the terms created thereunder, to said lessor, his heirs or assigns; and

(3). That The Cincinnati Street Railway Company, its successors and assigns, shall, at its or their option, have the right and privilege, and such right and privilege are hereby reserved to said company, its successors and assigns, jointly to use, forever and without rental, so much of said leased road and property as lies between the entrance to the Zoological Garden aforesaid and Mitchell avenue,

and to operate cars over the same in both directions for the purpose of reaching either Chester Park or Spring Grove Cemetery or other points in that vicinity; and in case such joint use is made, the said Cincinnati Street Railway Company, its successors and assigns, shall pay an equitable proportion of the cost of constructing and maintaining the road and property, and such proportion of taxes and assessments as may be levied on that portion of the line so used jointly.

It is further covenanted and agreed by and between the parties hereto that if this lease is surrendered as hereinbefore provided, the lessor, his heirs or assigns, shall pay the reasonable cost of any betterments which the lessee hereunder shall have placed on the leased road either in the way of track or overhead work or construction, less, however, ten per centum per annum of such cost for the number of years between the date or dates of incurring the cost and the time of such surrender, but no payment shall be made for any expense incurred more than ten (10) years prior to such surrender of this lease, nor for betterments, if any which may have been placed thereon at the expense of The Cincinnati Street Railway Company, its successors or assigns. And the lessee hereunder consents that the lessor shall transfer and assign all his title, rights and interests which shall remain to him in any part of the road and property hereby leased to The Cincinnati Street Railway Company, its successors or assigns.

And, subject to the provisions hereinbefore expressed, said lessee, for itself and for its successors and assigns, does hereby covenant and agree to and with the said lessor, his heirs and assigns, that the said lessee, its successors and assigns, will well and truly pay unto the said lessor, his heirs and assigns, the yearly rental of one dollar; and further, that the said lessee, its successors and assigns, will, in addition to the rental aforesaid reserved, pay all taxes, rates, charges, assessments, license fees and percentages on gross income or otherwise that may at any time during this demise be levied, rated, charged, assessed or imposed on said premises or any part thereof, or on account of the operation thereof, for any purpose whatsoever; and that for the better security and payment of said rents and the performance of the conditions and covenants herein contained by the said lessee, its successors and assigns, to be kept and performed, said lessor, his heirs and assigns, shall have a first lien, paramount to all others, on every right and interest of the said lessee to or in the above described premises; and further, that said lessee, its successors and assigns will not commit or suffer any waste upon said premises, and that it will and they shall, upon the termination of this lease, peaceably and quietly deliver up said premises to said lessor, his heirs or assigns. Provided, however, and these presents are upon these express conditions, that if at any time during this demise the said lessee, its successors or assigns shall fail to pay all taxes, rates, charges, assessments, license fees and percentages on gross income or otherwise that may at any time during this demise be levied, rated, charged, assessed or imposed on said premises, or on account of the operation of said railway, as the same may be required, or if the said lessee, its successors and assigns, shall fail faith-

fully to keep, observe and perform any other covenant, condition or agreement herein contained and by it or them to be kept and performed, that then or in either such case this lease shall cease, determine and be void, at the option of said lessor, and it shall and may be lawful for the said lessor, his heirs or assigns, to enter upon said premises with the appurtenances, or any part thereof, in the name of the whole, and the same to keep and repossess as though this demise had not been made, and the said lessee, its successors and assigns, and all others claiming under it or them from thence utterly to expel, remove and put out anything in these premises contained to the contrary thereof notwithstanding.

In witness whereof, the said Charles H. Kilgour has hereunto and to a duplicate hereof set his hand, and said The Mill Creek Valley Street Railroad Company, acting by its vice-president and secretary thereunto duly authorized, has caused its corporate name and seal to be hereunto and to a duplicate hereof subscribed and affixed the day and year first above written.

C. H. KILGOUR,

[SEAL.]

THE MILL CREEK VALLEY STREET
RAILROAD COMPANY,

By S. M. FELTON, *Vice-President*,

By O. B. BROWN, *Secretary*.

Signed, sealed and acknowledged in presence of us:

J. D. MEEKER.

J. B. BOUTET.

(One dollar internal revenue stamp affixed).

STATE OF OHIO,

Hamilton County, ss:

Be it remembered, that on the tenth day of October, in the year of our Lord one thousand eight hundred and nine-eight, before me, the subscriber, a notary public within and for said county, personally came Charles H. Kilgour and The Mill Creek Valley Street Railroad Company, by S. M. Felton, its vice-president, and O. B. Brown, its secretary, the parties named in the foregoing lease, and acknowledged the signing and sealing thereof to be their voluntary act, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

[NOTARIAL SEAL.]

J. B. MEEKER,

Notary Public, Hamilton County, Ohio.

EXHIBIT 16-A.

Whereas, a communication received by the Mayor from The Cincinnati Inclined Plane Railway Company has been reported to Council, giving notice of their intention to put in a double track in accordance with their grant made March 19, 1889, as amended May 21st, 1889;

Therefore, resolved that said company be requested to put in said track as speedily as possible and that the roadway be put in good repair as rapidly as the said tracks are laid pursuant to the provisions of Section 8 of their original grant.

I hereby certify that the above is a true copy of a resolution adopted by the Council of the Village of Carthage, Ohio, at their meeting held May 17th, 1892.

Attest:

LEWIS HALL,
Village Clerk, Carthage, Ohio.

EXHIBIT 17-A.

CINCINNATI, January 28th, 1889.

To the Honorable The Board of Councilmen of the Village of Carthage:

The Cincinnati Inclined Plane Railway Company has made application to the Board of County Commissioners of Hamilton County for permission to occupy with double or single tracks with the necessary turnouts and with the necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage turnpike to its northern terminus at or near the county fair grounds at Carthage, so as to enable the said company to furnish continuous, rapid and safe transportation by electricity from the Fountain Square in Cincinnati to the Village of Carthage, and now petition your honorable body for permission to occupy and operate its said railroad through your village, as above contemplated.

THE CINCINNATI INCLINED PLANE
RAILWAY CO.,
By H. H. LITTELL, *President.*

Attest:

J. M. DOHERTY, *Secretary.*

Received and read and ordered spread on the minutes January 29th, 1889.

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EXHIBIT 18-A.

Office of the Cincinnati Inclined Plane Railway Co.

CINCINNATI, February 11, 1889.

To the Honorable Council of Carthage.

GENTLEMEN: Our application to the County Commissioners for permission to extend our road from its present terminus at the Zoological Garden to the Village of Carthage is opposed by an application from The Cincinnati Suburban R. R. Co., represented by Mr. McCrea. The Commissioners can by a simple resolution give us the right to go ahead, as it will be an extension of an existing

road. But in the case of our opponents a route must be established, bids advertised for, and acted upon, all making the loss of much time, and probably ending in injunction and litigation preventing for a long time to come the construction of any road. We do not believe our opponents are in a condition to construct a road to the center of Cincinnati, but expect to depend upon any arrangement they can make with some existing road, either to buy out their grant, or carry their passengers.

This company makes the plain proposition to extend their electric road to Carthage and run the same car from Fountain Square in Cincinnati through the Zoological Garden to Carthage, and intend to construct the road as soon as their right to do so is obtained.

We think it very desirable that the citizens and Council of Carthage should declare their preference, as between the two applications, in unmistakable terms, and notify the Commissioners at their meeting upon Wednesday a. m. next.

THE CINCINNATI INCLINED PLANE
RAILWAY CO.,

By J. M. DOHERTY, *Secretary*.

Received, read and ordered filed February 12, 1889.

EXHIBIT 20-A.

The undersigned have associated together to form a company for the purpose of constructing a railroad, and do hereby certify as follows:

1. That the name of said company, and by which it shall be known, is "The Cincinnati Inclined Plane Railway Company".

291 2. The termini of said railroad will be in the city of Cincinnati and the Village of Avondale, in the county of Hamilton, Ohio.

3. The amount of capital stock necessary to construct said road will be one hundred thousand dollars.

In witness whereof we have hereunto set our hands and seals this 20th day of April, in the year eighteen hundred and seventy-one.

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

J. M. DOHERTY.
EDW. F. NOYES.
JOSEPH KINSEY.
CHAS. C. REAKIRT.
JOSEPH C. BUTLER.

(Five cent internal revenue stamp).

STATE OF OHIO,

Hamilton County, ss:

Before the undersigned, a Justice of the Peace in and for said county of Hamilton, Ohio, personally appeared J. M. Doherty,

Edw. F. Noyes, Joseph Kinsey, Chas. C. Reakirt and Joseph C. Butler, the above named signers to the foregoing certificate of incorporation of The Cincinnati Inclined Plane Railway Company, and severally acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein stated.

Witness my hand and seal this 20th day of April, A. D. 1871.

[SEAL.]

NATHAN MARCHANT,

Justice of the Peace, Hamilton County, Ohio.

(Five cent internal revenue stamp).

(Certified by Clerk of Common Pleas Court of Hamilton County, Ohio, and by Secretary of State of Ohio).

EXHIBIT 21-A.

An ordinance authorizing the extension of The Cincinnati Inclined Plane Railway from the head of Main street to Fifth Street Market Space.

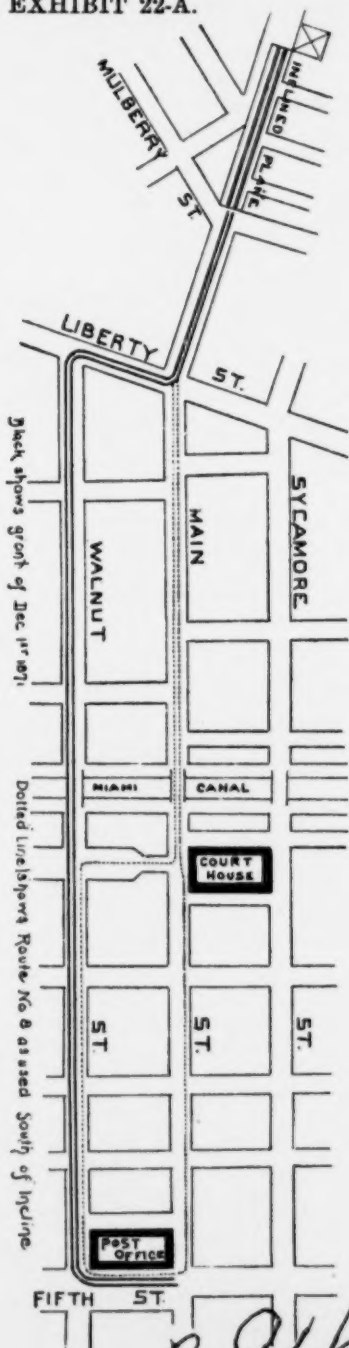
(Passed December 1, 1871).

Section 1. Permission to lay tracks on certain streets.

Conditions. Be it ordained, etc., that permission is hereby granted to The Cincinnati Inclined Plane Railway Company to lay
292 a double track from a point at or near the head of Main street, on the north side of Mulberry street; thence south along Main street to Liberty street; thence west on Liberty street to Walnut street; thence south on Walnut street to Fifth Street Market Space; thence east on Fifth Street Market Space, said tracks to be laid upon the following terms and conditions:

1. They shall occupy the center of the street, each track to have the same relative position to the curb and center line of the street; and the tracks shall be of a gauge of five feet two inches, and shall be placed as near together as practicable, allowing for the safe and convenient passage of cars thereon. The crown and slope of the said streets shall be made to conform to the levels which may be given by the City Civil Engineer; and if, in his opinion, it shall be considered necessary to take up the whole pavement from curb to curb to obtain the proper form and grade of such crown, the same shall be done at the joint expense of said railroad company and the city, in the proportion of one-fourth to the said company and three-fourths to the said city; and in case it is deemed proper by the city authorities at any time to change the grade of any street through which said road may pass, the said company shall be bound to relay its tracks in accordance with such changed grades at its own expense immediately after receiving notice from the City Civil Engineer to do so. Wherever it may be necessary to take up and relay an existing track, it shall be the duty of said company and it is hereby authorized, at its own expense, to take up and relay such track in its present good order and in its proper relation to the

EXHIBIT 22-A.



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center of the street. The rail to be used to be of the most improved kind and to be put down in such manner as to leave the surface of the street as nearly level as possible. The pattern and style of the rail to be submitted to the City Civil Engineer, and to be approved by him before being placed on the street.

2. Before using any of the existing tracks the said company shall tender or pay to the person or company owning the same an equal proportion of the cost of laying such tracks, and shall thereafter bear an equal proportion of the expense of keeping the same in repair.

3. The said company shall lay and keep in repair, between the rails a suitable wooden pavement, to be approved by the City Civil Engineer.

293 4. No motive power except horses and mules shall be used on the said tracks.

5. The charges for transportation over said portion of said company's line shall not exceed five cents for each passenger, and the said company shall keep for sale and sell upon its cars tickets in packages of twenty-five for one dollar.

6. Before the said company shall commence the construction of said tracks it shall obtain the consent of a majority in interest of the owners of property abutting thereon.

7. The said company shall pay and save the city harmless from any damages for which it may be liable for any injury to persons or property on account of the grant made under this ordinance.

(Here follows diagram marked p. 294.)

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EXHIBIT 23-A.

Office of The Cincinnati Inclined Plane Railway Co.

CINCINNATI, February 23, 1889.

To the Secretary of State of the State of Ohio:

The undersigned, being the president and directors of The Cincinnati Inclined Plane Railway Company, hereby certify that, at a meeting of the stockholders of said company, held at its office in Cincinnati, on the 23rd day of February, 1889, at 10 o'clock a. m., called by the president and board of directors of said company for the purpose of voting upon the question of extending the company's lines of road beyond its present northern terminus in Hamilton county to the Village of Glendale in the same county, notice of the time, place and purpose of said meeting having been given to the stockholders of said company, by publication for four consecutive weeks in the Cincinnati Commercial Gazette, a daily newspaper in general circulation, in said county of Hamilton, and holders of all the capital stock of said company voted in favor of said extension.

In witness whereof, the undersigned, the president and directors have hereunto set their hands and caused the seal of said company to be hereunto affixed this 23rd day of February, 1889.

[SEAL.]

H. H. LITTELL,

President;

ST. JOHN BOYLE,

M. J. O'CONNER,

H. H. LITTELL,

J. M. DOHERTY,

H. PEACHY,

JOSEPH S. HILL,

E. V. CHERRY,

Directors.

Attest:

J. M. DOHERTY, *Secretary.*

UNITED STATES OF AMERICA,

State of Ohio, ss:

Office of the Secretary of State.

I, Daniel J. Ryan, Secretary of State of the State of Ohio, do hereby certify that the annexed instrument is a copy carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the certificate of extension and change of terminus of The Cincinnati Inclined Plane Railway Company, filed in this office on the 27th day of February, A. D. 1889, and recorded in Vol. 42, page 611 of the records of incorporations.

Witness my hand and official seal at Columbus, Ohio, this 27th day of February, A. D. 1889.

[SEAL.]

DANIEL J. RYAN,
Secretary of State.

EXHIBIT 24-A.

Resolution Passed June 21st, 1898, Rescinding Granting Resolution of March 19, 1898.

Resolved, that the resolution adopted by the Council of the Village of Carthage, Ohio, on the 19th day of March, 1889, granting The Cincinnati Inclined Plane Railway Company permission to occupy with double or single tracks with the necessary appendages and appurtenances of an overhead electric street railway system, the Carthage turnpike and either of the roads leading to the Carthage fair grounds, and to operate its said electric road over and along the same through the Village of Carthage, be, and the same is hereby repealed, and all claims of the said The Cincinnati Inclined Plane Railway Company and its successors, claiming under said resolution, are hereby declared to be forfeited and annulled.

EXHIBIT 25-A.

Ordinance No. 1134, To Repeal "Ordinance No. 1039," Passed August 7, 1894, "To Provide for the Extension of the Cincinnati Inclined Plane Railway from the Northern Terminus of the Carthage Pike over Main Street and Lockland Avenue to the North Corporation Line of the Village of Carthage."

Be it ordained by the Council of the Village of Carthage, Ohio, as follows:

Section 1. That "Ordinance No. 1039, to provide for the extension of the Cincinnati Inclined Plane Railway from the northern terminus of the Carthage pike over Main street and Lockland avenue to the north corporation line of the Village of Carthage," passed August 7, 1894, be, and the same is hereby repealed.

SEC. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Done at the Council Chamber of the Village of Carthage, on the first day of July, 1898.

J. L. ORBISON, *Mayor.*

Attest:

LEWIS HALL, *Clerk.*

EXHIBIT 26.

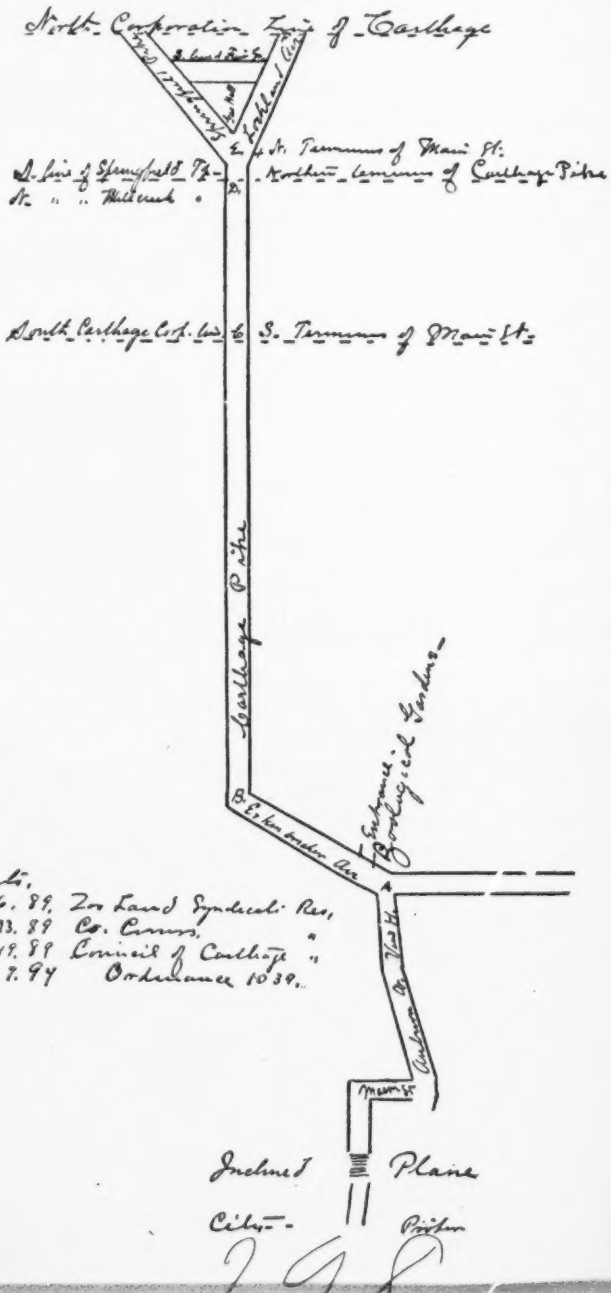
Resolutions Adopted by Council August 2d, 1898, Declaring the Occupancy of the Village Streets by the Railroad a Nuisance, and Ordering the Removal of the Tracks, Etc.

Resolved, That the occupancy of Main street north of the northern terminus of the Carthage pike, and the occupancy of Lockland avenue, all in the Village of Carthage, by the successor or successors of Cincinnati Inclined Plane Railway Company and the maintenance by said successor or successors of the track, rails, poles and wires used in operating a street railway over said Main street and Lockland avenue, are hereby declared to be a nuisance, and it is hereby ordered that said track, rails, poles and wires be removed by the owners thereof from said Main street and Lockland avenue within ten days, and in default of same being done this Council will take immediate steps to abate said nuisance.

Resolved, That the occupancy of Main street, Carthage pike, from the northern terminus of said Carthage pike to the south corporation line of the Village of Carthage, all in said Village of Carthage, by the successor or successors of The Cincinnati Inclined Plane Railway Company, and the maintenance by said successor or successors of the tracks, rails, poles and wires, and in operating a street railway over said Carthage pike are hereby declared to be a nuisance, and it is hereby ordered that said tracks, rails, poles and wires be removed by the owners thereof from said Carthage pike within ten days, and in default of same being done this Council will take immediate steps to abate said nuisance.

(Here follows diagram marked p. 298.)

EXHIBIT 26-A.



Alleged Grants,

A. to B. Apr 6. 89. 2nd Land Syndicate Res.

B. " D. Feb 23. 89 Co. Comm.

C. " D. Feb 19. 89 Council of Carthage "

D. " F. Aug 7. 94 Ordinance 1039.



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Supreme Court of Ohio.

No. 8981.

THE STATE OF OHIO, on the Relation of Harry M. Hoffheimer, Prosecuting Attorney of Hamilton County, Ohio, Plaintiff,

vs.

THE MILLCREEK VALLEY STREET RAILROAD COMPANY, a Corporation Organized Under the laws of the State of Ohio, and the Cincinnati Street Railway Company, a Corporation Organized Under the Laws of the State of Ohio, Defendants.

Error to the Circuit Court of Hamilton County, Ohio.

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Supreme Court of Ohio.

Record.

No. 8981.

(Filed April 29, 1904.)

THE STATE OF OHIO, on the Relation of Harry M. Hoffheimer, Prosecuting Attorney of Hamilton County, Ohio, Plaintiff,

vs.

THE MILLCREEK VALLEY STREET RAILROAD COMPANY, a Corporation Organized Under the Laws of the State of Ohio, and the Cincinnati Street Railway Company, a Corporation Organized Under the Laws of the State of Ohio, Defendants.

Petition in Error.

Plaintiff in error, the State of Ohio, on the relation of Harry M. Hoffheimer, Prosecuting Attorney of Hamilton County, Ohio, says that the January Term, 1904, of the Circuit Court of Hamilton County, Ohio, the defendants in error, the Millcreek Valley Street Railroad Company, a corporation, and the Cincinnati Street Railway Company, a corporation, recovered a judgment and decree by the consideration of said court against the plaintiff in error, in an action then pending therein, and numbered 3415 on the docket of said court, wherein the plaintiff in error was plaintiff and the defendants in error were defendants; and the said plaintiff in error files herewith a transcript of the docket and journal entries, the original papers

and the bills of exceptions in said case and make them a part of this petition in error.

Plaintiff in error says there is error in said record, and proceedings prejudicial to plaintiff in error, in this, to-wit:

303 1. Said court erred in overruling the motion to strike out portions of the answers of the defendants in error filed by the plaintiff in error.

2. Said court erred in refusing to grant to plaintiff in error leave to file the amendment to reply, for which leave was asked on the 4th day of May, 1903.

3. Said court erred in sustaining the demurrer of the defendants in error to the reply of the plaintiff in error.

4. Said court erred in overruling the motion of the plaintiff in error for a new trial.

5. Said court erred in admitting evidence offered by the defendants in error, to which the plaintiff in error objected.

6. Said court erred in excluding evidence offered by the plaintiff in error.

7. Said judgment was given for said defendant in error, when it ought to have been given for the plaintiff in error.

8. Said judgment is contrary to law.

9. Said judgment is not supported by the evidence.

Plaintiff in error therefore prays that said judgment and decree may be reversed, and that it may be restored to all things it has lost by reason hereof.

HARRY M. HOFFHEIMER,
Prosecuting Attorney.

SAM'L W. BELL,
CHARLES L. SWAIN,
JOHN R. SAYLER,
SAMUEL B. HAMMEL,
WM. WORTHINGTON,

His Attorneys.

Entry of Appearance.

Now come the said defendants in error, the Millcreek Valley Street Railroad Company, a corporation, and the Cincinnati Street Railway Company, a corporation, by their attorneys of record, and waive the issuing and service of summons herein and voluntarily enter their appearance.

PAXTON & WARRINGTON,
KITTREDGE & WILBY,
*Attorneys for the Millcreek Valley St. Ry.
Co. and the Cincinnati St. Ry. Co.*

304 *Transcript of Docket and Journal Entries in Circuit Court.*

(Filed in Supreme Court April 29, 1904.)

Quo warranto. Petition filed February 2, 1901. Action in quo warranto. (We are security for costs: John R. Saylor, Samuel B. Hammel, Samuel W. Bell).

February 11, 1901. Summons returned: February 4, 1901. Served the within named defendants, the Millcreek Valley Street Railroad Company, a corporation organized under the laws of the state of Ohio, by delivering a true copy of this writ with all the endorsements thereon personally to Gazzam Gano, president thereof. Also served the Cincinnati Street Railway Company, a corporation organized under the laws of the state of Ohio, by delivering a true copy of this writ with all the endorsements thereon personally to John Harris, superintendent of said company, no chief officer being found. Thomas S. Taylor, Sheriff Hamilton County, Ohio, by Robt. Sweeny, Deputy. Sheriff's fees, \$1.80.

May 9, 1901. Minute 140: Separate answer of the Cincinnati Street Railway Company filed by leave.

May 9, 1901. Minute 141: Separate answer of the Millcreek Valley Street Railroad Company filed by leave.

October 25, 1901. Motion to strike out portions of answer filed.

October 25, 1901. Motion to strike out portions of answer of Cincinnati Street Railway Company filed.

October 25, 1901. Demurrer to first cause of action in answer of Cincinnati Street Railway Company filed.

December 10, 1901. Minute 350: Entry sustaining demurrer to first defense and overruling motion to strike out; defendant excepts to sustaining a demurrer and plaintiff to overruling the motion.

This cause coming on this day to be heard upon the demurrer of the plaintiff to their first defense set forth in the separate answer of the Cincinnati Street Railway Company filed herein, was argued by counsel and submitted to the court and the court being fully advised in the premises finds said demurrer well taken and orders that the same be sustained, to which ruling the defendant by their counsel excepts.

Said cause coming on further to be heard upon the motion of plaintiff to strike out certain passages in the separate answer of the Cincinnati Street Railway Company filed herein was argued by counsel and submitted to the court, and the court being fully advised in the premises deem it advisable to reserve final action upon the relevancy of the allegations of said answer objected to in said motion until the hearing upon the merits and therefore does

305 overrule said motion, to which ruling both as to said motion as a whole and separately as to each specification thereof, the plaintiff by its counsel excepts.

And said cause coming on further to be heard upon the motion of plaintiff to strike out certain passages in the separate answer of The Millcreek Valley Street Railroad Company filed herein was

argued by counsel and submitted to the court, and the court being fully advised in the premises deems it advisable to reserve final action upon the relevancy of the allegations of said answer objected to in said motion until the hearing upon the merits, and therefore does overrule said motion, to which ruling both as to said motion as a whole and separately as to each specification thereof the plaintiff by its counsel excepts. And the plaintiff is granted ten days within which to file its reply.

December 14, 1901. Certificate to Laura V. Jones, official stenographer, for \$2.00.

April 12, 1902. Minute 170: Entry granting leave to plaintiff to file replies to answers of defendants within five days.

Leave is hereby granted plaintiff to the file replies to the answers of defendants within five days.

April 14, 1902. Reply to the answer of The Cincinnati Street Railway Co. filed.

April 14, 1902. Reply to the answer of Millcreek Valley Street Railroad Co. filed.

June 9, 1902. Depositions on behalf of plaintiff filed.

February 5, 1903. Minute 34: Amendment to petition filed by leave.

March 2, 1903. Minute 74: Amendment to the answer and additional answer of The Millcreek Valley Street Railroad Co. filed by leave.

April 30, 1903. Minute 116: Reply of plaintiff to amended answer and additional answer of The Millcreek Valley Street Railroad Co., filed by leave.

May 4, 1903. Minute 119: Demurrer to reply filed by leave.

May 8, 1903. Bill of exceptions and directions for notification filed.

This day came the attorneys for the plaintiff, and in view of the fact that Hon. Ferdinand Jelke will be absent from the county and state for some months from this date, make application in open court for an order directing the clerk of this court to transmit immediately (without waiting for the statutory time to elapse) the bill of exceptions filed herein on behalf of the plaintiff on the 8th day of May, 1903, and upon counsel for defendants in open court consenting and agreeing to waive the statutory time within which they are permitted to file objections or amendments to this bill of exceptions, and further consenting and agreeing to file at once any objections or amendments they may propose to said bill of exceptions, if any they have, it is by the court ordered that the clerk transmit forthwith to the trial judges said bill of exceptions together with all objections and amendments if any filed thereto.

And thereupon the defendants, by their counsel, making no objections to said bill and asking no amendments thereto, and said bill being found correct, the same is now by consent allowed, settled, signed and filed.

June 1, 1903. Bill of exceptions transmitted to Judges Jelke and Swing.

June 1, 1903. Bill of exceptions received from Judges Jelke and Swing, endorsed "allowed."

June 11, 1903. Amended reply to amendment to the answer and additional answer of The Millcreek Valley Street Railroad Co. filed.

November 21, 1903. Minute 261: Application for official stenographer filed and security approved.

Application for official stenographer received and security approved.

Wherefore it is considered by the court that the petition in this cause be dismissed and that the defendants and each of them recover judgment against the plaintiff for their costs herein expended, taxed at \$—.

To all of which the plaintiff excepts.

And thereupon the plaintiff filed its motion in writing for a new trial of this cause for reasons appearing therein, which motion was submitted to the court, and on consideration thereof the court finds that said motion is not well taken, and doth overrule the same, to which ruling the plaintiff excepts.

January 6, 1904. Motion for a new trial filed.

January 6, 1904. Certificate to L. V. Jones, official stenographer, for \$39.00.

February 10, 1904. Bills of exceptions and directions for notification filed.

February 10, 1904. Notice of filing of bill of exceptions served on Kittredge & Wilby, Paxton & Warrington and Burch & Johnson.

February 29, 1904. Bill of exceptions transmitted to Judges Swing, Giffen and Jelke.

March 1, 1904. Bill of exceptions received from Judges Swing, Giffen and Jelke, endorsed "allowed."

(Duly certified.)

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Petition.

(Filed February 2, 1901.)

Hamilton County, Ohio, Circuit Court.

No. 3415.

THE STATE OF OHIO on the Relation of HARRY M. HOFFHEIMER,
Prosecuting Attorney of Hamilton County, Ohio, Plaintiff,

vs.

THE MILLCREEK VALLEY STREET RAILROAD COMPANY, a Corporation
Organized under the Laws of the State of Ohio, and The
Cincinnati Street Railway Company, a Corporation Organized
under the Laws of the State of Ohio, Defendants.

And now comes Harry M. Hoffheimer, the duly elected, qualified and acting Prosecuting Attorney of Hamilton County, Ohio, and gives the court to understand and be informed that the defendants, The Millcreek Valley Street Railroad Company, a corporation organized under the laws of the State of Ohio, and The Cincinnati Street Railway Company, a corporation organized under the laws of the State of Ohio, are by some arrangement between themselves, the terms of which arrangement are to this plaintiff unknown, maintaining and operating a street railroad, commencing in the city of Cincinnati, Ohio, at the corner of Fifth and Main streets, thence running to the Zoological Garden in Erkenbrecher Avenue, and

extending thence by double track along said Erkenbrecher Avenue to the Carthage Pike, thence along said Carthage Pike northwardly through the city of Cincinnati, the village of St. Bernard, the village of Elmwood Place, and into the village of Carthage, to the northern terminus of the Carthage Pike, and thence northwardly on Main street and Lockland Avenue to the north corporation line of said village of Carthage; said defendants claiming to have succeeded to the rights of The Cincinnati Inclined Plane Railway Company therein.

And this plaintiff says that under authority granted by a charter issued under the laws of the State of Ohio, to The Cincinnati Inclined Plane Railway Company, of date the 20th day of April, 1871, for the purpose of constructing a railroad, the said The Cincinnati Inclined Plane Railway Company in the year 1871, constructed a railroad known and designated as The Cincinnati Inclined Plane Railway, from the head of Main street to Locust street in said city of Cincinnati, and maintained and operated the same as a railroad.

309 That on December 1, 1871, an ordinance was passed by the council of the city of Cincinnati authorizing the extension of The Cincinnati Inclined Plane Railway as a street railroad, from the head of Main street to Fifth street market space in said city of Cincinnati; and thereupon under the authority given by said ordinance and the statute as to extensions of street railroads and no other, said The Cincinnati Inclined Plane Railway Company did extend the tracks of the said The Cincinnati Inclined Plane Street Railway Company from the head of Main street to Fifth street market space; that by the provisions of said ordinance, charges for transportation over said portion of said company's line being the portion of said company's line extending from the head of Main street to the Fifth street market space, should not exceed five (5) cent for each passenger, and that said company should keep for sale and sell upon its cars tickets in packages of twenty-five (25) for one dollar (\$1.00); thereupon the said The Cincinnati Inclined Plane Railway Company operated its lines so extended as a street railroad.

And plaintiff further says that upon the 27th day of October, 1875, an ordinance was passed by the council of said city of Cincinnati, authorizing the further extension of The Cincinnati Inclined Plane Railway as a street railroad to the then north corporation line of the city of Cincinnati, at the Zoological Garden, and that thereupon, under the authority given by said ordinance and the statute as to extension of the street railroads and no other, said The Cincinnati Inclined Plane Railway Company did extend the tracks of its said line commencing at the Inclined Plane, thence north on Locust street to Mason street, and on Mason street from Locust street to Auburn street, and on Auburn street from Mason street northerly to Vine street, and on Vine street to the corporation line of the city of Cincinnati at the Zoological Garden; that under the provisions of said ordinance the charges for transportation over said portion of said company's lines, being the portion thereof extending from the Inclined Plane and running thence northerly to the cor-

poration line of said city at the Zoological Garden should not exceed five cents cash, nor more than one ticket for each passenger, and that said company should keep for sale and sell on the cars run on said portion tickets in packages of twenty-five for one dollar, and should also furnish on its cars through single tickets, good for one passage to or from the Zoological Garden and the corner of Fifth and Main streets for ten (10) cents; but said provision for a ten cent fare was contrary to the provisions of the statute for extensions of street railroads and was void; and thereupon the said The Cincinnati Inclined Plane Railway Company operated its lines so extended as a street railroad.

That thereafter, under authority conferred by the Zoological Land Syndicate under date of April 6, 1889, and by resolution passed by the Commissioners of Hamilton county on the 23rd day of March, 1889, and by resolution passed by the village of Carthage on the 19th day of March, 1889, said The Cincinnati Inclined Plane Railway Company extended its tracks from a point at or near the entrance to the Zoological Garden in said city of Cincinnati over Erkenbrecher Avenue to Carthage Pike, and thence northerly over said Carthage Pike to the northern terminus thereof in the village of Carthage, and operated its lines so extended as a street railroad.

That thereafter, under the authority of an ordinance passed by the council of the village of Carthage of date August 7th, 1894, The Cincinnati Inclined Plane Railway Company extended the tracks of its said railroad from the northern terminus of the Carthage Pike in the village of Carthage, northwardly over Main street and Lockland avenue to the north corporation line of said village of Carthage; and said The Cincinnati Inclined Plane Railway Company operated its lines so extended as a street railroad.

That at the time the said The Cincinnati Inclined Plane Railway Company extended its tracks as aforesaid from a point at or near the Zoological Garden northwardly over Erkenbrecher Avenue and Carthage Turnpike, the charge legally authorized and actually made for carrying passengers over said street railroad from the corner of Fifth and Main streets in said city of Cincinnati to the Zoological Garden in said city was, and since said time has been five (5) cents.

And this plaintiff says that the said defendants have entered into and now usurp and unlawfully and wrongfully hold and exercise franchises within this State as follows:

In this, to-wit:

First. That they, the said defendants, wrongfully and unlawfully refuse to transport passengers for one cash fare of five cents from any point on said street railroad north of Mitchell Avenue intersecting said street railroad, to Fifth and Main streets, in said city of Cincinnati, or to any point on said street railroad south of the entrance to the Zoological Garden, and wrongfully and unlawfully exact a cash fare of ten cents or a ticket fare of eight and one-third (8 $\frac{1}{3}$) cents, for transporting passengers from any point

on said street railroad north of Mitchell Avenue to the corner of Fifth and Main streets in said city of Cincinnati, or to any point on said street railroad south of the entrance to the Zoological Garden; said intersection with Mitchell Avenue being about one and one-half ($1\frac{1}{2}$) miles north of the entrance to the Zoological Garden aforesaid.

Second. That they, the said defendants, wrongfully and unlawfully refuse to transport passengers for one cash fare of five cents from Fifth and Main streets in said city of Cincinnati, or
311 from any point between Fifth and Main streets and the entrance to the Zoological Garden to any point on said street railroad north of Mitchell avenue, intersecting said street railroad, and wrongfully and unlawfully exact a cash fare of ten cents or a ticket fare of eight and one-third cents for transporting passengers from the corner of Fifth and Main streets in the city of Cincinnati or from any point between Fifth and Main streets and the entrance to the Zoological Garden, to any point on said street railroad north of Mitchell avenue.

Third. That the line of the said street railroad built as aforesaid extended over certain streets including Main street from its intersection with Liberty street to the foot of the Inclined Plane, and over the said Inclined Plane and northwardly from said Inclined Plane over Locust street, Mason street and Auburn street to Vine street; and that the said The Cincinnati Inclined Plane Railway Company operated its said street railroad, including said portion as a street railroad; that the said defendants have ceased to operate as a street railroad said portion of said line of said street railroad from a point in Main street at its intersection with Liberty street in said city of Cincinnati to the intersection of Auburn street and Vine street, a distance of over one (1) mile.

Fourth. That in operating its cars from the northern terminus of said line of street railroad, as extended as aforesaid, at the north corporation of said village of Carthage to and from said intersection of Fifth and Main streets in said city of Cincinnati, said defendants not only refuse to run their cars over the said portion thereof, extending from the intersection of Vine and Auburn streets to the intersection of Main and Liberty streets, or any part thereof, but without authority of law operate said cars by running the same from the intersection of Vine and Auburn streets, southwardly over Vine street to McMicken avenue and thence eastwardly over McMicken avenue to Main street at its intersection with Liberty street, while running southwardly, and conversely from the said intersection of Main and Liberty streets to the intersection of Vine and Auburn streets, while running northwardly.

Wherefore, plaintiff prays that the said defendants may be required to avow by what warrant they claim to hold and exercise all and singular the franchises aforesaid, and upon final hearing of this

cause that they may be ousted and altogether excluded therefrom, and that the relator recover his costs.

HARRY M. HOFFHEIMER,

Prosecuting Attorney.

SAM'L W. BELL,

SAMUEL B. HAMMEL,

JOHN R. SAYLER,

WM. WORTHINGTON,

Counsel.

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Precipe to Clerk.

Please issue summons on the within petition for the defendants, The Millcreek Valley Street Railroad Company, a corporation organized under the laws of the state of Ohio, and The Cincinnati Street Railway Company, a corporation organized under the laws of the state of Ohio, returnable according to law. Endorse on writ, "Action in Quo Warranto."

HARRY M. HOFFHEIMER,

Prosecuting Attorney in and for Hamilton

County, State of Ohio.

(Endorsed on back:) We are security for costs in this case. John R. Sayler, Samuel B. Hammel, Samuel W. Bell.

Separate Answer of the Cincinnati Street Railway Co.

(Filed by Leave May 9, 1901, Minute 140.)

1. For a first defense The Cincinnati Street Railway Company alleges that the Prosecuting Attorney received no direction from any official or tribunal authorized to direct him to commence this action, and the facts stated in his petition did not authorize or warrant its commencement.

2. For a second defense, said defendant admits that it is a corporation organized under the laws of the state of Ohio, and that the other corporations mentioned in the petition were organized under the laws of said state, but it denies each and every other allegation contained in said petition, and states that the same are not true except as hereinafter expressly admitted and set forth. Said defendant avers that in or about April, 1871, The Cincinnati Inclined Plane Railway Company, named in the petition, was duly organized under the provisions of the general incorporation act of Ohio of May 1, 1852, commonly known as the steam-railroad act; that the purpose of such corporation was to construct a railroad, the termini of which were to be in city of Cincinnati and the village of Glendale in Hamilton county. On June 16, 1871, said company was authorized by ordinance of Cincinnati to occupy a portion of Locust street and to cross Miami, Baltimore and Dorsey streets, with its railroad, for a period of not exceeding twenty (20) years from said

date. Thereupon said company constructed an inclined plane railway from the base of the hill near the intersection of Main and Mulberry streets in Cincinnati to the top of the hill on Locust street. The length of the inclined plane was about eight hundred feet, within which distance it attained an elevation of about three hundred feet, and was operated by steam. By an ordinance of Cincinnati passed December 1, 1871, said company obtained permission to lay a double surface track from the head of Main street along
313 said street to Liberty street, and thence along certain other streets therein named to the market space in Fifth street; but it never constructed or operated any portion of said tracks except between Mulberry and Liberty streets, the company having under authority of an act of the General Assembly, passed March 30, 1877, acquired the right to use and occupy the tracks of what was known as Route 8 of Cincinnati street railways, along Main street from Liberty street by double surface track to Court street, along Court by single surface track to Walnut, along Walnut to Fifth, along Fifth (the market space) to Main, along Main to Court, where it intersected said double surface track in Main. On October 27, 1875, said company was granted permission by ordinance of Cincinnati to use and occupy for thirty years with double track Locust street from the top of the Inclined Plane north to Mason, Mason to Auburn, Auburn with single track to Vine (said company occupying a track of said Route 8 in Auburn between said last named points, Mason and Vine), and thence by double track on Vine to the north corporation line and entrance to the Zoological Garden. The rates of fare charged and paid on said Inclined Plane for more than twenty years prior to the commencement of this action, were five cents for each passenger; the rates authorized and charged on the line between the base of said Inclined Plane and Fifth street market space were five cents for single cash fare and four cents each for commutation tickets in packages of twenty-five; the rates authorized and charged on the railway between the top of said Inclined Plane and the entrance to the Zoological Garden were the same as those last mentioned; and the other rate authorized and charged under and in virtue of said last named ordinance for passage between said Fifth street market space and the entrance to the Zoological Garden were ten cents for each passenger. That in September, 1885, the city of Cincinnati authorized said company to use electricity, cable or compressed air as a motive power along the said railways, the one running south from the base of said plane, and the other running north from the top thereof, as before described, and electricity was used as the motive power thereon until the dates hereinafter mentioned, steam however being always used as the motive power for operating said Inclined Plane until the time last alluded to. The grant for said Route 8 was made in 1864, and by its terms expired in 1884. The permission granted said company by the city of Cincinnati as aforesaid, to use and occupy a portion of Locust street and to cross Baltimore, Miami and Dorsey streets in the construction and operation of its said inclined plane railway, expired in 1891. The city of Cincinnati refused to renew either of said grants, but suffered said

company nevertheless to continue to operate said Route 8 tracks and said Inclined Plane tracks until a short time prior to the judicial sale made of said company's railway property as herein-after stated.

The said defendant further avers that on or about April 14, 1898, under certain proceedings then pending in the Circuit Court of the United States for the Southern District of Ohio, Western Division, Sixth Judicial Circuit, the railway aforesaid, in connection with another line then belonging to The Cincinnati Inclined Plane Railway Company, was offered for sale in two parts, one of which was the portion lying south of the entrance to the Zoological Garden, and was sold to Charles H. Kilgour and subsequently transferred by him to this defendant; the portion so transferred to this defendant being the line granted October 27, 1875, between the top of the Inclined Plane and the entrance to the Zoological Garden, also the Inclined Plane railway before described, and also the portion actually used under the grant of December 1, 1871, in Main street between the base of the Inclined Plane and Liberty street; and this defendant did not and could not operate said Inclined Plane because of the expiration of the grant in that behalf, and it did not obtain and consequently could not operate any portion of Route 8 because the grant therefor had expired and The Cincinnati Inclined Plane Railway Company had itself been ousted from the use and operation thereof prior to the time of said judicial sale; and its inability to operate said Inclined Plane and the portion of Route 8 on Auburn avenue before described, rendered it impracticable to operate the line described in the ordinance of October 27, 1875.

Said defendant further avers that it is now and from a time prior to the judicial sale hereinbefore referred to has been the owner of the electric railway tracks commencing at the Fifth street market space at the corner of Fifth and Main streets in Cincinnati, thence by single track north on Main street to Court, thence by double track along Main, McMicken and Vine to the entrance to the Zoological Garden, also a single track from the intersection of Court and Main along Court and Walnut and Fifth or said market space to Main and Fifth, the place of beginning; that by a traffic arrangement made between this defendant and its co-defendant, The Millcreek Valley Street Railroad Company, this defendant has rented the right to use the cars of said Millcreek Valley Street Railroad Company, and was so operating the same over said line of tracks at the time of the commencement of this action and until the 21st of February, 1901, when this defendant leased its railways to The Cincinnati Traction Company, a corporation organized under the laws of Ohio, which has ever since then continued to operate said road, receiving said cars from said Millcreek Valley Street Railroad Company at the entrance to the Zoological Garden, and delivering them to said company on the return trip at the same point, the said Millcreek Valley Street Railroad Company itself operating said cars between the entrance to said garden by double track westwardly and northwardly along Erkenbrecher avenue and the Carthage pike through the villages of St. Bernard, Elmwood and Carthage;

that the said line of railway so belonging to and so operated by this defendant between the points aforesaid is identical with the old line hereinbefore described between the entrance to the Zoological Garden and the intersection of Vine and Auburn, and south of McMicken along Main, Court, Walnut and Fifth, and substantially parallel with and a short distance west of the old line between the intersections of McMicken and Main and Vine and Auburn; that the cars running to and from the village of Carthage to and from the Fountain Square or Fifth street market space aforesaid, are operated continuously between said points under said traffic arrangement at rates of fare lower than the rates authorized and charged as aforesaid over the old Cincinnati Inclined Plane Railway between Fountain Square and the Zoological Garden and between Fountain Square and the village of Carthage; and that said rates are lawful and according to and in pursuance of the rights and franchises granted by the city of Cincinnati to this defendant.

Said defendant further avers that in addition to the privileges so given to passengers desiring to ride on said cars of said Millcreek Valley Street Railroad Company, whether south-bound or north-bound as aforesaid, this defendant gives to each of said passengers the right and privilege at any and all times, without additional charge, to be transferred to and from and over other lines of electric railways belonging to this defendant, as follows: The Avondale line east from Fifth and Walnut streets; the Belt line south or west from Twelfth and Main; the Chester Park and Elm street line west from Fifth and Walnut; the Chester Park and John street line west from Fifth and Walnut; the Clark street line west from Fifth and Walnut; the Clifton and Elm street line west from Fifth and Walnut; the Colerain avenue line west from Fifth and Walnut; the Fairmount avenue line west from Fifth and Walnut; the John street line west from Fifth and Walnut; the McMicken and Elm street line west from Fifth and Walnut; the Sedamsville line west from Fifth and Walnut; the Seventh street line west from Fifth and Walnut, the Third and Fifth streets line west from Fifth and Walnut; the Westwood line west from Fifth and Walnut; the Elberon avenue and Warsaw avenue line west from Sixth and Walnut; the Delta avenue line east from Fifth and Walnut; the East End line east from Fifth and Walnut; the Gilbert avenue line east from Fifth and Walnut; the Lock street line east from Fifth and Walnut; the Madison avenue line east from Fifth and Walnut; the Norwood and Gilbert avenue line east from Fifth and Walnut; the College Hill and Main street line west from Vine and Clifton; the Cross Town line
 316 east or west from Vine and McMicken; the McMicken and Main street line west from Vine and McMicken; the Mulberry street line north from Main and Liberty; the Vine and Norwood line east from Vine and McMillan; the Vine and Clifton avenue line north from Vine and Wayne; the Zoo and Eden Park line east on Erkenbrecher from Vine; and that no transfers whatever of passengers were made from or to any part of the line held and operated by said Cincinnati Inclined Plane Railway Company, but that the

rates of fare charged and paid on said line entitled passengers to ride only on that line.

Wherefore, said defendant prays to be hence dismissed with its costs.

PAXTON & WARRINGTON,
KITTREDGE & WILBY,

Attorneys for Cincinnati Street Railway Company.

(Duly verified.)

Separate Answer of the Millcreek Valley Street Railroad Co.

(Filed by Leave May 9, 1901, Minute 141.)

The Millcreek Valley Street Railroad Company, one of the defendants herein, refers to and hereby adopts as part of its answer herein the answer of the Cincinnati Street Railway Company, the same as if the allegations, admissions and denials therein set forth were at large repeated and set forth herein.

For a further defense said defendant avers that on or about the 6th day of April, 1889, an association known as the Zoological Land Syndicate was the owner and in possession of certain land lying between the entrance to the Zoological Garden and the Carthage Pike; that on said date said syndicate granted to The Cincinnati Inclined Plane Railway Company the right to construct and maintain and operate a double surface railroad track with the necessary appendages and appurtenances for an overhead electric railroad system over said land from the entrance to said garden to said turnpike; and that the strip of land within which the said line of railway was located was afterward dedicated and accepted subject to said railway grant as a street known as the westerly portion of Erkenbrecher avenue.

Defendant further avers that at the dates hereinafter mentioned and for many years prior thereto the Carthage Pike extended from a point south of the said Erkenbrecher avenue northwardly to a point in the northerly portion in the incorporated village of Carthage; that on said dates said turnpike was in the possession and under the control of the Commissioners of Hamilton County as a toll road;

317 that on or about the 23d day of March, 1889, said County Commissioners by a resolution duly passed granted to the said Cincinnati Inclined Plane Railway Company the right and privilege to use and occupy with double tracks, with the necessary appendages and appurtenances of an overhead electric railroad system, the said Carthage Pike from a point therein near Ludlow avenue (being south of said Erkenbrecher avenue), northwardly by double surface track to the north terminus of said turnpike in said village of Carthage; and that among the terms and conditions upon which said grant was made the rates of fare were fixed as follows: Fifteen cents cash for a single trip between Fountain Square (Cincinnati) and either Carthage or Elmwood or return; ten cents cash for single trip between Fountain Square and St. Bernard or Ludlow Grove or return; ten cents cash for single trip between the Zoological Garden and Car-

thage Pike or Elmwood or return; and five cents cash for single trip between the Zoological Garden and St. Bernard or Ludlow Grove or return.

Defendant further avers that said grant of the County Commissioners was "made at the special instance and request of said villages of Carthage and St. Bernard," and by and with the consent of the property holders along said turnpike; said village of Carthage by ordinance passed on August 7, 1894, entitled "An ordinance to provide for the extension of the Cincinnati Inclined Plane Railway from the northern terminus of the Carthage Pike, over Main street and Lockland avenue to the north corporation line of the village of Carthage," granted the right to construct said railway to the county fair grounds. It was also provided in said ordinance, among other things, that the extension so authorized should commence at the south corporation line of said village and continue along the Carthage Pike (then called Main street) to its intersection with said Lockland avenue, and thence northwardly as aforesaid, the railway tracks of said Inclined Plane Company being then actually constructed and in operation along the portion of said turnpike so within the village limits, as before stated. Another requirement and condition of the ordinance last mentioned was in substance that passengers should be carried through without change from the corner of Fifth and Walnut streets in Cincinnati to the north corporation line of said village, "the object being to avoid breaks and consequent changes from one car to another at either the entrance to the Zoological Garden or top or base of the inclined plane railroad aforesaid, and instead thereof to obtain continuous operation of said cars from said village to the business center, to-wit, Fifth and Walnut streets of Cincinnati, for a rate of fare not to exceed ten cents either way." Said Inclined Plane Railway Company, upon the faith of the grants hereinbefore recited, constructed tracks over the land of said Zoological Land Syndicate, over said Turnpike and over said Lockland avenue, and operated the same for years and until its property

318 was sold at judicial sale as stated in the answer of The Cincinnati Street Railway Company, without objection of any one and at great cost and expense.

Defendant further avers that it acquired title to the right to operate the line of railroad aforesaid between the entrance to the Zoological Garden and the north corporation line of said village of Carthage, in the following manner: That said line of railway and property were sold under and according to a certain decree of foreclosure and sale made in cause No. 4859 of the Circuit Court of the United States within and for the Southern District of Ohio, Western Division, Sixth Judicial Circuit, wherein the Louisville Trust Company, a corporation, was complainant, and The Cincinnati Inclined Plane Railway Company and others were defendants, certain mortgages securing certain negotiable coupon bonds being the object of foreclosure in said action; that said Inclined Plane Railway Company was duly served with process in said cause and thereafter such proceedings were had therein that on or about the 4th day of February, 1898, said court

entered its decree of foreclosure in said cause; that said record, among other things, provided that the master commissioner appointed by the court should sell at public auction the line of railway and property aforesaid lying north of the entrance to said Zoological Garden; that on or about the 14th day of April, 1898, said railway was struck off and sold to Charles H. Kilgour; that thereafter said sale was duly confirmed by order of said court, and the said line of railway and property together with the rights and franchises of said Inclined Plane Railway Company were duly conveyed to said Kilgour; that the said judgment and decree remain in full force and effect and that no proceedings were ever commenced to reverse or set aside the same, and this defendant hereby refers to the pleadings, decree and orders made in said cause and to the record thereof, and prays leave to produce and exhibit the same as evidence at the trial hereof; that the name of this defendant was then The Cincinnati, Hamilton, Middletown & Dayton Street Railway Company, but was subsequently duly changed to the name under which it is impleaded herein; that said defendant was organized under the laws of Ohio authorizing the construction, maintenance and operation of electric street railroads for the transportation of passengers, packages, express matters, etc., and upon public highways in this state between the cities of Dayton and Cincinnati; that at the time of the sale under the decree of the Circuit Court of the United States as aforesaid the said Kilgour purchased the line of railway extending from the entrance to the Zoological Garden over the land of the Zoological Garden Syndicate, the Carthage Turnpike and Lockland avenue, to the north corporation line of the village of Carthage, as before described, 319 under and in pursuance of an arrangement obligating him perpetually to lease to this defendant so much of the railway property as lies between the entrance to said Zoological Garden and the northernmost point in the Carthage Pike which is intersected by the corporation line of the city of Cincinnati, and to sell and convey to this defendant by absolute title the said line of railway and property lying north of that point; that said arrangement was carried out, and this defendant entered into possession of said line of railway and property and the operation thereof long prior to the commencement of this action.

Defendant further avers that by reason of the facts stated in the answer to The Cincinnati Street Railway Company, before referred to, which prevented and still prevents the operation of the Cincinnati Inclined Plane and the lines of railway leading from its base and summit respectively, the one southwardly to Fifth and Walnut streets and the other northwardly to the entrance to the Zoological Garden, this defendant was compelled to and did enter into the arrangement mentioned in the answer of said Cincinnati Street Railway Company whereby the cars of this defendant are operated continuously, both south of and north of the entrance to the Zoological Garden and so as to carry passengers without change between Fifth and Walnut streets of Cincinnati to the Village of Carthage; that under and in pursuance of said arrangement passengers have been and are carried without change of cars over said line of railway along which the cars

of this defendant are operated between Fifth and Walnut streets in Cincinnati and the village of Carthage, "at lower rates of fare than those authorized by the legislation mentioned herein and that mentioned in the answer of said Cincinnati Street Railway Company fixing the rates of fare between said points, and that the same is true as to the rates of fare charged between all intermediate points mentioned in the petition."

Defendant further avers that despite the legislation hereinbefore mentioned and referred to, and despite the facts touching the rates of fare aforesaid, the village of Carthage, through whose instrumentality this suit was instituted, repudiated all its legislation and sought through violence to prevent this defendant from operating within its limits; in consequence whereof this defendant brought an action in the court of Common Pleas of this county to enjoin interference by said village, and afterward said cause was appealed to this court, being numbered 3023 on its docket; that said village denied the right of defendant to occupy and use its streets for railway purposes, but upon hearing this court enjoined it perpetually from interfering in any manner with or molesting this defendant or any of its officers or agents in the quiet and peaceful maintenance, use or operation of its said railroad property; and said cause was afterward taken 320 by the village of Carthage, upon proceedings in error, to the Supreme Court of the state, and the judgment of this court was affirmed by that court; this defendant asks leave to produce the record of that cause at the hearing of this one.

Defendant having fully answered, prays to be dismissed hence with its costs.

BURCH & JOHNSON,
Attorneys for Answering Defendant.

(Duly verified.)

Motion to Strike Out Portions of Answer of the Millcreek Valley Street Railroad Co.

(Filed October 25, 1901.)

And now comes the plaintiff and moves the court to strike out the following passage respectively, in the separate answer of the Millcreek Valley Street Railroad Company filed herein, for that all and singular of the allegations contained in said passages respectively, are immaterial and irrelevant, viz.:

1. The passage containing the words, "made at the special instance and request of said villages of Carthage and St. Bernard."

2. The passage beginning with the words, "The object being to avoid breaks," down to and inclusive of the words "not to exceed ten cents either way."

3. The passage beginning with the words, "Said Inclined Plane Railway Company, upon the faith," down to and inclusive of the words, "and at great cost and expense."

4. The passage beginning with the words, "Defendant further

avers that by reason," down to and inclusive of the words, "and the village of Carthage."

5. The passage beginning with the words, "At lower rates of fare," down to and inclusive of the words, "points mentioned in the petition."

6. The passage beginning with the words, "Defendant further avers that despite," down to and inclusive of the words, "at the hearing of this one."

WM. WORTHINGTON,
SAM'L W. BELL,
JOHN R. SAYLER,
SAMUEL B. HAMMEL,
Attorneys for Plaintiff.

321 *Motion to Strike Out Portions of Answer of the Cincinnati Street Railway Co.*

(Filed October 25, 1901.)

Now comes the plaintiff and moves the court to strike out the following passages respectively in the separate answer of The Cincinnati Street Railway Company filed herein, for that all and singular of the allegations contained in said passages respectively, are immaterial and irrelevant, namely:

1. The passage beginning with the words, "That the said line of railway so belonging to and operated by this defendant between the points aforesaid is identical with the old line," down to and inclusive of the words, "franchises granted by the city of Cincinnati to this defendant."

2. The last paragraph in said answer following the passage mentioned in the preceding specification and extending to the prayer at the end of said answer, beginning with the words "Said defendant further avers that in addition to the privilege so given to passengers," down to and including the words, "entitle passengers to ride only on that line."

WM. WORTHINGTON,
JOHN R. SAYLER,
SAMUEL B. HAMMEL,
SAM'L W. BELL,
Attorneys for Plaintiff.

Demurrer to First Cause of Action in Answer of the Cincinnati Street Railway Co.

(Filed October 25, 1901.)

First Defense. Now comes the plaintiff and demurs to the first defense set forth in the separate answer of the The Cincinnati Street

Railway Company herein, for that it is insufficient in law upon its face.

WM. WORTHINGTON,
JOHN R. SAYLER,
SAMUEL B. HAMMEL,
SAM'L W. BELL,

Attorneys for Plaintiff.

Reply to the Answer of the Cincinnati Street Railway Company.

(Filed April 14, 1902.)

Now comes the plaintiff and for reply to the second defense set forth in the answer of The Cincinnati Street Railway Company admits that an ordinance passed June 16, 1871, the city of Cincinnati authorized the said The Cincinnati Inclined Plane Railway Company to occupy a portion of Locust street and to cross Miami, 322 Baltimore and Dorsey streets with its railroad for a period not exceeding twenty years from said date; that the Inclined Plane Railway constructed by said company was about eight hundred feet in length, in which distance it attained an elevation of about three hundred feet, and was operated by chain or cable moved by steam; that the rates of fare charged and paid on said Inclined Plane from Mulberry street to Locust street were five cents for each passenger; that the rates of fare authorized and charged for each passenger riding solely between the base of said Inclined Plane and Fifth street market space or the top of said Inclined Plane and the entrance to the Zoological Garden were respectively five cents per single cash fare, and four cents each for commutation tickets in packages of twenty-five; that in September, 1885, the city of Cincinnati authorized said Inclined Plane Railway Company to use electricity, cable or compressed air as a motive power for its said railway and the extensions thereof, and that shortly thereafter electricity was adopted as a motive power for said extension, steam continuing to be used on said Inclined Plane as long as the same was operated; that the grant made by the city of Cincinnati for the operation of street railroad Route No. 8 had expired prior to the year 1891, and in said last named year the privilege theretofore granted by said city to said The Cincinnati Inclined Plane Railway Company to occupy a portion of Locust street and to cross Baltimore, Miami and Dorsey streets in the construction and operation of its inclined railway also expired; and that notwithstanding such expiration said The Cincinnati Inclined Plane Railway Company continued thereafter with the sufferance and permission of said city to operate its said Inclined Plane, and to use the tracks of said Route 8 so far as the same were on the lines of the extensions of said Inclined Plane Railway made by said city until shortly before the 14th day of April, 1898, at which time the line of railway belonging to said The Cincinnati Inclined Plane Railway Company from Fountain Square or Fifth street market space in the city of Cincinnati to its northern terminus

at the north corporation line of the village of Carthage was sold to Charles H. Kilgour under judicial proceedings had in the Circuit Court of the United States for the Southern District of Ohio, Western Division, Sixth Judicial Circuit, as an entirety, however, not in parcels; and the plaintiff denies each and every other allegation contained in said second defense except in so far as the same is an admission of matters stated in the petition herein.

Wherefore, plaintiff prays for relief as originally prayed for in its petition herein.

SAM'L W. BELL,
JOHN R. SAYLER,
SAMUEL B. HAMMEL,
WM. WORTHINGTON,
Attorneys for Plaintiff.

323 *Reply to the Answer of the Millcreek Valley Street Railroad Co.*

(Filed April 14, 1902.)

And now comes the said plaintiff and for a reply to the separate answer of The Millcreek Valley Street Railroad Company, says:

That plaintiff admits that on or about the 6th day of April, 1889, an association known as the Zoological Land Syndicate was the owner and in possession of certain land lying between the entrance to the Zoological Garden and the Carthage Pike, as in said answer set out.

And plaintiff further admits that at the dates mentioned in said answer the Carthage Pike extended from a point south of the said Erkenbrecher avenue northwardly to a point in the northerly portion of the incorporated village of Carthage.

And plaintiff admits that the village of Carthage passed an ordinance on August 7, 1894, entitled as in said answer set out, and being the ordinance of same date referred to in the petition; that the tracks were then actually constructed along the portion of said turnpike within the village limits; that one of the requirements and conditions of the ordinance was that passengers should be carried through without change from the corner of Fifth and Walnut streets in Cincinnati to the north corporation line of said village.

And this plaintiff denies each and every allegation in said answer contained, not herein admitted, and which is not an admission of an averment in the petition.

Wherefore, plaintiff prays as originally prayed in the petition.

SAM'L W. BELL,
WM. WORTHINGTON,
SAMUEL B. HAMMEL,
JOHN R. SAYLER,
Attorneys for Plaintiff.

Amendment to Petition.

(Filed by Leave February 6, 1903. Minute 34.)

Now comes said Harry M. Hoffheimer, the duly elected, qualified and acting Prosecuting Attorney of Hamilton County, Ohio, and further gives the court to understand and be informed that by reason of the facts stated in the petition herein, The Millcreek Valley Street Railroad Company is illegally and without authority of law usurping and exercising the franchise of operating and maintaining so much of the line of street railroad described in the petition herein, as lies north of the entrance to the Zoological Garden, 324 and of charging and collecting fares from passengers traveling thereon, and that said defendants are unlawfully and without authority at law usurping the franchise of running street railroad cars over the portion aforesaid of the line of railroad described in the petition, and of collecting fares from passengers traveling over the same to or from the part thereof south of the entrance to the Zoological Garden.

Wherefore, plaintiff prays that the said defendants may be required to avow by what warrant they hold and exercise the franchises aforesaid, and upon final hearing of this cause that they may be ousted and altogether excluded therefrom, and that the relator recover his costs herein.

HARRY M. HOFFHEIMER,
Prosecuting Attorney.
SAM'L W. BELL,
JOHN R. SAYLER,
WM. WORTHINGTON,
SAMUEL B. HAMMEL,
Attorneys for Plaintiff.

Amendment to the Answer and Additional Answer of the Millcreek Valley Street Railroad Co.

(Filed by Leave March 2, 1903. Minute 74.)

Now comes The Millcreek Valley Street Railway Company, one of the defendants herein, and refers to and adopts as part of its answer herein the answer of The Cincinnati Street Railway Company herein, the same as if the allegations, admissions and denials therein set forth were at large repeated and set forth herein; and adopts the original answer of the said The Millcreek Valley Street Railroad Company herein the same as if the allegations, admissions and denials therein set forth were at large repeated and set forth herein.

And, by way of amendment to its said answer, and by way of further answer to the amended petition filed herein on the sixth day of February, 1903, this answering defendant files herewith and makes a part hereof, a true copy of the original articles of incorporation of

this defendant, which is hereto attached and marked "Exhibit No. 1."

This defendant further files herewith and makes a part hereof, a true copy of the certificate of subscription to the capital stock of this company, hereto attached, and marked "Exhibit No. 2."

This defendant further files herewith and makes part hereof, a true copy of the amendment to the articles of incorporation of this defendant company, and the same is hereto attached, marked "Exhibit 3."

This defendant further files herewith, and makes part hereof, a true copy of the resolution of the Board of County Commissioners of Hamilton County, Ohio, passed on or about the 23rd day of March, 1889, granting to The Cincinnati Inclined Plane Railway Company the right to construct, maintain and operate a street railroad in the Carthage Turnpike, which is hereto attached, marked "Exhibit No. 4."

And this defendant avers that said grant was duly accepted by the grantee therein named.

This defendant now files herewith and makes a part hereof, a true copy of a grant of the Zoological Land Syndicate of the right to construct, maintain and operate a street railroad from the entrance to the Zoological Garden to the intersection of the Carthage Turnpike, over land then belonging, in fee simple, to said Zoological Land Syndicate, which is hereto attached, marked "Exhibit No. 5."

This defendant files herewith and makes a part hereof a true copy of an ordinance passed by the council of the village of St. Bernard, which is hereto attached, marked "Exhibit No. 6."

And this defendant avers that said ordinance was duly accepted by the grantee named therein.

This defendant files herewith and makes a part hereof, a true copy of an ordinance passed by the council of the incorporated village of Elmwood Place, which is hereto attached, marked "Exhibit No. 7."

This defendant files herewith and makes a part hereof, a true copy of a resolution of the council of the incorporated village of Elmwood Place, addressed to the Commissioners of Hamilton County, which is hereto attached marked "Exhibit No. 8."

This defendant further files herewith and makes a part hereof, a true copy of a resolution passed by the incorporated village of Carthage, on the 19th day of March, 1889, which is hereto attached, marked "Exhibit No. 9."

This defendant files herewith and makes a part hereof, a true copy of an ordinance No. 1039, passed by the council of the incorporated village of Carthage on the 7th day of August, 1894, which is hereto attached, marked "Exhibit No. 10."

And this defendant avers that said ordinance was duly accepted by the grantee named therein.

This defendant files herewith and makes a part hereof, a true copy of a deed from The Cincinnati Inclined Plane Railway Company, per Special Commissioner, to Charles H. Kilgour, dated the 20th day of May, 1898, and recorded in Deed Book No. 825, page 272, of the Hamilton County Land Records, which is hereto attached, marked "Exhibit No. 11"; which said deed was made in pursuance of the order

of sale and confirmation thereof, made in cause No. 4859, Circuit Court of the United States, for the Southern District of Ohio, Western Division, as is more fully set forth in the original answer of this defendant herein, wherein The Louisville Trust Company was plaintiff and The Cincinnati Inclined Plane Railway Company et al., including the City of Cincinnati, which filed its answer in said cause, were defendants.

This defendant files herewith and makes a part hereof, a true copy of a perpetual lease from Charles H. Kilgour to The Millcreek Valley Street Railroad Company, dated the 10th day of October, 1898, which is hereto attached, marked "Exhibit No. 12."

This defendant files herewith and makes a part hereof, a true copy of a deed from Charles H. Kilgour to The Millcreek Valley Street Railroad Company, dated the 10th day of October, A. D. 1898, which is hereto attached, marked "Exhibit No. 13."

This defendant files herewith and makes a part hereof, a true copy of an agreement made on the 19th day of July, 1898, between this defendant and the defendant The Cincinnati Street Railway Company, which is hereto attached, marked "Exhibit No. 14."

Wherefore, having fully answered, this defendant, The Millcreek Valley Street Railroad Company, prays to be hence dismissed, with its costs.

J. W. WARRINGTON,

E. W. KITTREDGE,

Attorneys for Answering Defendant.

(Duly verified.)

* * * * *

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EXHIBIT No. 2.

The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, Certificate of Subscription.

CINCINNATI, O., December 26, 1894.

To the Secretary of State, Columbus, Ohio:

We, the undersigned, a majority of the incorporators of The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, do hereby certify that on the 22nd day of December, 1894, all the incorporators of said company did order, in writing, that books be opened for subscriptions to the capital stock of said company at the office of A. Hickenlooper, Fourth and Plum streets, Cincinnati, Ohio, on the 26th day of December, 1894, at 3 o'clock p. m.; and, at the same time, did waive in writing the notice by publication of the time and place of such opening of books of subscription required by law; and further, said books having been opened at the time and place ordered, that ten per cent. of the capital stock of said company has been subscribed.

A. HICKENLOOPER,
CHARLES FLEISCHMAN,
L. C. WEIR,
H. H. HOFFMAN,
ORIN BRITT BROWN,

Incorporators.

UNITED STATES OF AMERICA,

State of Ohio, Office of the Secretary of State, ss:

I, Samuel M. Taylor, Secretary of State of the State of Ohio, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Certificate of Subscription to the capital stock of The Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, filed in this office under Section 3244 of the Revised Statutes, on the 29th day of December, A. D. 1894, and recorded in Volume 62, Page 239, of the Records of Incorporations.

Witness my hand and official seal at Columbus, Ohio, this 29th day of December, A. D. 1894.

SAMUEL M. TAYLOR,
Secretary of State.

* * * * *

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EXHIBIT No. 5.

Consent of Zoological Land Syndicate.

April 6, 1889.

Whereas, The Cincinnati Inclined Plane Railway Company has obtained the right of the County Commissioners of Hamilton County, Ohio, to use and occupy with double tracks and with the necessary appendages and appurtenances of an overhead electric street railroad system the Carthage turnpike, commencing at a point in or near its intersection with Ludlow avenue and running thence upon and along the said Carthage turnpike to its northern terminus at or near the county fair grounds at Carthage, so as to enable the said company to furnish continuous, rapid and safe transportation between Fountain Square, in Cincinnati, and the village of Carthage, in said county; and

Whereas, The said Cincinnati Inclined Plane Railway Company desire to secure the right of constructing and extending said electric road through the property of the Zoological Garden Syndicate to the Carthage turnpike.

Now, the undersigned, as trustees of said syndicate, hereby grant to The Cincinnati Inclined Plane Railway Company the right to construct and extend double tracks, with the necessary appendages and appurtenances of an overhead electric street railroad system, from the present northern terminus of said railroad to Erkenbrecher avenue, and thence upon and along said avenue to the Carthage turnpike.

It being expressly understood that said trustees hereby give this right upon the express condition that said Cincinnati Inclined Plane Railway Company permits other duly authorized railway companies to run over the tracks so laid as aforesaid by said Cincinnati Inclined Plane Railway Company, provided (1) that the cars of such other company shall not be so operated upon such tracks on said premises

as to interfere with the operation of the cars of The Cincinnati Inclined Plane Railway Company; and (2) that the owner or owners of such other street railroads to whom such privilege is granted shall pay to The Cincinnati Inclined Plane Railway Company a proportionate share of the cost of construction and maintaining the portion of the tracks by them so used, and in the event of the failure to agree upon an amount to be paid The Cincinnati Inclined Plane Railway Company under the provision hereof, each of said parties shall appoint an arbitrator and such arbitrators a third person, who together shall determine the same; and the decision of a majority shall be final, and the expense of such arbitration shall be equally divided between the company so requesting said privilege and the said Cincinnati Inclined Plane Railway Company.

333 The work of laying such tracks shall be done by said Cincinnati Inclined Plane Railway Company in accordance with the direction of the engineer of said trustees in manner to conform to the grades and not to injure the said streets and avenues.

In witness whereof, we have hereunto set our hands, this 6th day of April, A. D., 1889.

ZOOLOGICAL LAND SYNDICATE,
By JULIUS DEXTER,
ALBERT G. ERKENBRECHER,
Trustees.

EXHIBIT No. 6.

An Ordinance No. 275.

An Ordinance to Grant the Use of the Streets of said Village to the Cincinnati Inclined Plane Railway Company.

Be it ordained by the Council of the Village of St. Bernard, Ohio, that permission be, and is hereby granted to The Cincinnati Inclined Plane Railway Company to use and occupy the streets of said village at grade with railway tracks, poles, wires, sidetracks and other appurtenances required for the construction and running of an electric road.

Provided, that said streets be placed in the same condition as they may be at the time before the occupancy thereof by said company, and that said streets shall not be permanently obstructed by any poles, wires, or other appurtenances of said company.

Done at the council chamber in St. Bernard this 5th day of February, A. D., 1889.

WM. SCHULHOF,
Mayor and Pres't of Council.

Attest:

JOHN G. OVERMANN, *Clerk.*

I hereby certify that this — a correct copy of the Ordinance No. 275 as it appears on record at my office.

GEORGE MEYER,
Corp. Clerk.

EXHIBIT No. 7.

An Ordinance No. 9.

An Ordinance Regulating the Construction of Street Railways.

Be it ordained by the Council of the incorporated Village of Elmwood Place,

SECTION 1. That in the construction of a street railway in any of the streets or public highways within said village where a single track is to be used, said track shall be laid in the center of such street or public highway.

SECTION 2. That in case a double track is to be used, the inside rail of such tracks shall be within two feet of the center of such street or public highway, and where only one track is to be laid and it is the purpose of the person, partnership or corporation constructing such street railroad to lay a second track at some future time, then the inside rail of such track shall be within two feet of the center of such street or public highway, and all switches or side-track shall be laid on the opposite side of said street or highway, and the inside rail of such switch or side-track shall be within two feet of the center thereof.

SECTION 3. That in case poles are erected to aid in the operation of any street railway, such poles shall be kept in good repair and painted.

SECTION 4. This ordinance to be in full force and effect from and upon its legal passage.

Elmwood Place, September 2, 1890.

EMIL HEUN, *Mayor.*

Attest:

JNO. KINDEL, *Clerk.*

Clerk's Certificate.

I, John Kindel, Clerk of the Village of Elmwood Place, do hereby certify that the foregoing ordinance was duly published, posting copies thereof at five of the most prominent places of the village, as follows: one at the Mayor's office, one at the council chamber, one at the C., H. & D. R. R. depot, one at the C., C., C. & St. L. R. R. depot and one at the engine house each for the period of fifteen days.

JOHN KINDEL, *Clerk.*

I, Harry G. Shaefer, Clerk of the Village of Elmwood Place, do hereby certify that the above is a true and correct copy of the ordinance and clerk's certificate as recorded in the ordinance book of said village, page 38.

HARRY G. SHAEFER, *Clerk.*

EXHIBIT No. 8.

Resolution.

Resolved, By the Council of the incorporated Village of Elmwood Place, Ohio, that the Commissioners of Hamilton County be and are hereby requested to cause the tracks of The Cincinnati Inclined Plane Railway Company through said village to be raised to a proper height, to conform to the grade of the gutter flagging laid by said village along the Carthage pike to be fil-ed to conform to said gutter.

Passed, Elmwood Place, September 27, 1892.

A. C. KAYLOR,
Chairman pro Tem.
A. C. KAYLOR.

Attest:

JOHN KINDEL, *Clerk.*

335-353 I, Harry G. Shaefer, clerk of the village of Elmwood Place, do hereby certify that above is a true and correct copy of the resolution recorded on page 128 of the ordinances of said village.

HARRY G. SHAEFER, *Clerk.*

* * * * *

354 (*Agreement Between C., H., M. & D. St. Ry. Co. and Cin'ti St. Ry. Co.*)

(July 19, 1898.)

STATE OF OHIO,

Hamilton County, ss:

Agreement made this 19th day of July, 1898, between the Cincinnati, Hamilton, Middletown & Dayton Street Railway Company, a corporation organized under the laws of Ohio, of the first part, and The Cincinnati Street Railway Company, a like corporation, of the second part.

The first party has purchased from Charles H. Kilgour, Esq., the portion of The Cincinnati Inclined Plane Railroad, which lies in Hamilton County, Ohio, north of the northern-most point in the Carthage Pike which is intersected by the Corporation Line of Cincinnati, Ohio, together with the power plant known as Power House No. 2, and has also leased from him, subject to certain rights of both parties hereto, as hereinafter mentioned, the portion of
355 said railroad property which lies between the said point in the Carthage Pike and the entrance to the Zoological Garden in Cincinnati.

Said first party is about to construct a line of street railroad from the City of Hamilton in Butler County, Ohio, to a connection in, or near, the Village of Carthage with the railroad so purchased of said

Kilgour, so as to furnish a continuous service between said City of Hamilton and the certain line of the second party which connects Fountain Square with the Zoological Garden aforesaid.

Therefore in consideration of the mutual advantages to be derived hereunder, it is agreed between the parties hereto, each covenanting for itself, its successors and assigns, and in favor of the other, and its successors and assigns, as to each and all the provisions hereinafter contained, as follows: The first party is at all times to supply good, substantial and first-class cars of patterns, dimensions and weight, satisfactory to and to be approved by the second party, which are to be operated over any portion of road belonging to the second party; but the second party shall not at any time be bound to receive and operate any such cars unless they are then in complete repair and condition; such cars shall be subjected to careful inspection daily, at the sole expense of the first party, through one or more competent and experienced inspectors, to be first approved by the second party. Said cars are to be operated by the second party between the entrance to the Zoological Garden and Fountain Square, via the Vine Street line or such other line, or lines, as the parties hereto may agree upon, without operating expense of any kind to the first party, the second party furnishing the motormen, conductors and power for such cars while they are on any portion of its line between said points, and without payment to said first party for use of said cars as rental or otherwise except one cent to be paid by said second party for each adult passenger and one-half cent for each child under ten years of age, whom the second party receives from or delivers to said first party at the Zoological Garden and from whom said second party had either received or is entitled to receive fare; and the first party shall issue coupons to all passengers who shall pay full fares at the regular cash rates, distinguishing by color or otherwise between fares paid by adults and by children, and shall pay to the second party on account of such coupons the full cash rates (five cents for adults and two and one-half cents for children) received less one cent for adults and one-half cent for children, for rent of cars only as stated; and said coupons shall be received by the second party when presented to its conductors upon the first party's cars.

The second party shall furnish transfers to all adult through passengers going south on the first party's cars south of Erkenbrecher Avenue, who shall have paid fares and present a coupon issued by the first party good from the Zoological Garden to Fountain Square, and who desire to proceed in the same same general direction, upon any of the second party's lines.

The second party shall at all times have the right to operate its own cars over the same line, or lines, upon which it shall operate the first party's cars, south of the entrance to the Zoological Garden; but the operation of the cars of both parties will be conducted with a view to their mutual convenience and advantage.

The second party having succeeded to the title, rights and interest of Charles H. Kilgour under the certain lease made by him to the first party herein of the portion of The Cincinnati Inclined Plane Railway property lying and being between the entrance of the

Zoological Garden and the northernmost point in the Carthage Pike, which is intersected by the Corporation Line of Cincinnati, subject to right of joint use reserved in favor of the second party hereto, now, it, said second party, consents to be bound by all and singular the terms and provisions thereof which would be binding upon said Kilgour, on condition, however, that the first party herein will perform all of its covenants under said lease, and also and especially that it will not seek and it hereby agrees not to seek any extension of its own railroad as in said lease provided, and also not to become interested in any railroad or railroad enterprise which is in competition with or opposed to the interests of said second party; and in case the first party shall do so, then all its rights hereunder and under said lease shall forthwith cease and determine and the second party may thereupon resume operation of its own line exclusively with its own cars south of the Zoological Garden and take exclusive possession also of the line covered by the said lease; that it, said first party, shall place the road and property described in said lease in first-class condition and repair, and shall during the continuance of said lease keep the said road and property in like repair, shall pay all taxes, assessments and charges of every kind that may be levied or imposed upon said road and property or upon said first party on account of its operation of said road and property, with the understanding that in the event of such joint occupation the second party shall, in the proportion that the daily average number of trips that its cars make over said part of road bears to the whole daily average number of trips made over the same, bear its portion of all such expenses and charges, including construction, repairs and maintenance and cost of power; but the expense of repairing either surface or overhead electric appliances which are damaged or injured by the operation of any of the cars of either party, shall be borne by the party owning or operating the car.

If at any time by reason of hostile legislation by the City of Cincinnati or of license fees or charges on gross income, or
357 otherwise imposed by the said city, the first party shall find it unprofitable to operate the portion of road covered by said lease, then, and in that event, the first party may cease operating the same and surrender the lease and all estate and interest thereunder to the second party. And if for any of said reasons the first party shall surrender its lease, the second party shall pay to the first party the reasonable cost of any betterments it may have placed on any part of the leased road, either by way of tracks, overhead works or construction, less ten (10) per centum per annum upon such cost for the number of years between the date or dates of incurring the cost and the time of surrendering the lease. But no payment shall be made for any costs incurred more than ten (10) years prior to the date of surrender, nor for the cost of any betterments, if any, which the second party may have placed or paid for on or along said leased road.

During the continuance of this agreement and as one of the considerations therefor the second party shall not extend its street railroad line to any point in the Mill Creek Valley north of the present

north Corporation Line of Cincinnati, nor be a party in any manner to having the same so extended; if legally or otherwise said second party is compelled to extend any facilities to any line in any way competitive with the line of the first party, then, and in that event, such facilities shall under no circumstances be more favorable than those covered by this agreement.

The second party shall pay all car licenses and charges on gross incomes, if any shall be charged, which shall at any time be assessed against said first party by the authorities of Cincinnati on account of the second party's operation of the first party's cars between the entrance to the Zoological Garden and Fountain Square; but it shall not be liable to pay any such car licenses or charges levied on account of cars operated upon or earnings derived from any portion of the road or property or franchises north of the entrance to said Zoological Garden except on its own cars or its own earnings.

In case the first party shall for reasons stated herein terminate the operation of its cars in the Carthage Pike at the north end of the leased road, then the second party shall receive and operate the first party's cars at that point instead of at the entrance to the Zoological Garden, and all the foregoing provisions relating to the operation of the road south of the Zoological Garden shall in that case apply also to the portion of the leased road surrendered to the first party, except that passengers are, in the event of such surrender, to be carried by the second party over such surrendered road from the north Corporation Line. Settlements of fares and otherwise hereunder shall be made at the end of every period of thirty (30) days.

This agreement shall continue for the life of the franchise
358 of the second party subject to the provision as to its termination in a certain agreement with Charles H. Kilgour whereby the Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company obligates itself not to extend its line within the present city limits of Cincinnati, directly or indirectly, and subject also to all the other provisions of said agreement with Charles H. Kilgour and of the lease therein provided for.

It is further mutually covenanted and agreed by the parties hereto, that all questions of difference arising between the parties hereto in relation to the construction of this agreement, or otherwise in reference to the rights of the parties under this contract, except the matter of fares or transfers, shall, upon the written demand of either party, stating in such demand the question or questions claimed to be in dispute, be submitted to the arbitration of three disinterested arbitrators, one of whom shall be selected by each of the parties hereto, but if either party shall fail so to appoint an arbitrator within ten days after written notice of the selection of an arbitrator by the other party, then the arbitrator selected by the party giving notice, shall select the other one, and the two thus chosen shall select the third arbitrator, and the award in writing, of said arbitrators, or a majority of them thus selected shall be final and conclusive between the parties hereto, their successors and assigns. The said arbitrators shall meet at Cincinnati within ten days after the selection of the third arbitrator as herein provided, and, on notice to the parties,

proceed after being duly sworn, to hear and determine the controversy, and they shall have power to direct either party to do all such acts as they may determine to be necessary or expedient to carry their award into effect.

In witness whereof, the Cincinnati, Hamilton, Middletown & Dayton Street Railroad Company, acting by its President, L. C. Weir, and its Secretary, O. B. Brown, thereunto duly authorized, and The Cincinnati Street Railway Company, acting by its President, John Kilgour, and its Secretary, James A. Collins, thereunto duly authorized, have hereunto and to a duplicate hereof, caused their corporate names to be subscribed and their corporate seals to be affixed on the day first above written.

THE CINCINNATI, HAMILTON, MIDDLE-
TOWN AND DAYTON STREET RAIL-
ROAD COMPANY,

[SEAL.] By L. C. WEIR, *President*.

O. B. BROWN, *Secretary*.

THE CINCINNATI STREET RAILWAY
COMPANY,

[SEAL.] By JOHN KILGOUR, *President*.

JAMES A. COLLINS, *Secretary*.

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Reply of Plaintiff.

(Filed by leave April 30, 1903, Minute 116.)

Now comes the plaintiff, and for reply to the amendment to the answer and additional answer of The Millcreek Valley Street Railroad Company, says that at the time of the passage of the various resolutions and proceedings set forth in said amendment to the answer, the said Carthage Turnpike from the point where the railroad afterwards constructed by said defendant enters thereon northwardly to Mitchell Avenue was as to the east half thereof situate in the village of Avondale, and as to the west half thereof situate in the village of Clifton; and that the same remained situate in said two villages as aforesaid until said two villages were annexed to the city of Cincinnati on or about the first day of January, 1895, and since said annexation said portion of said Carthage Turnpike has continued to be and is now a part of the city of Cincinnati, said village and city respectively having been and being municipal corporations under the laws of Ohio.

SAM'L W. BELL,
SAMUEL B. HAMMEL,
JOHN R. SAYLER,
WM. WORTHINGTON,
Attorneys for Plaintiff.

Demurrer to Reply.

(Filed by Leave May 4, 1903. Minute 119.)

Defendants demur to plaintiff's reply, filed April 30, 1903, and pray judgment of the court.

E. W. KITTREDGE,
WALLACE BURCH,
J. W. WARRINGTON,
Attorneys for Defendants.

Bill of Exceptions.

(Filed May 8, 1903.)

Be it remembered that on the 4th day of May, 1903, the above entitled action was called for trial before the Honorable Ferdinand Jelke, Jr., and Peter F. Swing, Judges of said Hamilton Circuit Court.

And thereupon counsel for relator stated that they were ready to proceed with the trial; and thereupon counsel for defendants asked the court to postpone the hearing for the purpose of permitting them to consider the reply filed by the relator and to determine whether or not they would file a demurrer to said reply.

360 And thereupon counsel for relator in open court stated they desired leave to file an amendment to their reply, setting forth as exhibits a communication under date of January 22, 1889, addressed by H. H. Littell, President of The Cincinnati Inclined Plane Railway Company, to the Board of County Commissioners of Hamilton County, Ohio, and a communication under date of February 23, 1889, signed by the President and Directors of The Cincinnati Inclined Plane Railway Company, and filed in the office of the Board of County Commissioners.

Thereupon and after counsel for the relator had prepared their amendment to said reply and submitted it to counsel for defendants for inspection, counsel for defendants applied to and were granted leave to file and did file a demurrer to the reply theretofore filed by counsel for the relator.

And thereupon counsel for the relator presented their amendment to reply, with certified copies of the above mentioned communications attached thereto, marked Exhibit "A" and Exhibit "B," which said amendment to reply is hereto attached, marked Exhibit "I," and asked the court to grant leave to file said amendment to reply.

And thereupon said court having considered said application to file said amendment to reply, refused to grant the request of counsel for relator, and ruled that said amendment to reply should not be allowed to be filed at this time.

To which said ruling counsel for relator excepted, and presented this, their bill of exceptions, and prayed that the same be allowed,

signed, sealed and made part of the record, which is accordingly done this first day of June, 1903.

FERDINAND JELKE, JR.,
P. F. SWING,

Judges of the Circuit Court of Hamilton County, Ohio

EXHIBIT "I."

Amendment to Reply.

Now comes the plaintiff and amends its reply herein by adding thereto the following:

The resolution of the Board of County Commissioners of Hamilton County, passed on or about March 23, 1889, referred and made part of the amendment to the answer, etc., of The Millcreek Valley Street Railroad Company filed herein on March 23, 1903, as Exhibit 4 thereof, was passed in pursuance of applications made by The Cincinnati Inclined Plane Railway Company, dated January 22, 1889, and February 23, 1889, filed with said Board of County Commissioners, copies of which are attached hereto and made part
361 hereof and marked respectively Exhibit A and Exhibit B.

SAM'L W. BELL,
SAMUEL B. HAMMEL,
JOHN R. SAYLER,
WM. WORTHINGTON,
Attorneys for Plaintiff.

EXHIBIT "A."

CINCINNATI, January 22nd, 1889.

To the Honorable the Board of County Commissioners of Hamilton County, Ohio.

GENTLEMEN: The Cincinnati Inclined Plane Railway Company is now adapting its route from Fifth and Walnut streets to the Zoological Garden so as to operate the same by electricity, and is desirous of extending the same from its present terminus to the Hamilton County Fair Grounds at Carthage, so as to furnish continuous, rapid and safe transportation between Fountain Square in Cincinnati and the village of Carthage in this county, and therefore petitions your honorable body for permission to use and occupy with double or single tracks with the necessary turnouts and with the necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage Turnpike, commencing at a point at or near its intersection with Ludlow Avenue and running thence upon and along the said Carthage Turnpike to its northern terminus at or near the County Fair Grounds at Carthage.

Very respectfully,
[SEAL.]

H. M. LITTELL, *President.*

Attest: J. M. DOHERTY, *Secretary.*

CINCINNATI, O., January 7th, 1903.

I, Geo. C. Zimmermann, Clerk of the Board of County Commissioners of Hamilton County, Ohio, do hereby certify that the foregoing is a true and correct copy of a communication received from The Cincinnati Inclined Plane Railway Co. by the Board of County Commissioners of said county, and read at its meeting on the 23rd day of January, 1889.

Witness my hand and seal on the day and year aforesaid.

GEO. C. ZIMMERMANN,

Clerk Board of Hamilton County Commissioners.

EXHIBIT "B."

Office of The Cincinnati Inclined Plane Railway Company.

CINCINNATI, February 23rd, 1889.

At a meeting of the stockholders of The Cincinnati Inclined Plane Railway Company held at its office in Cincinnati, on the 23rd day of February, 1889, at 10 o'clock a. m., called by the President and Directors of said company for the purpose of voting upon the ques-

tion of extending the company's line of road beyond its present northern terminus in Hamilton County, to the village of

362 Glendale in the same county, and for such other business as might be brought before the meeting, notice of time, place and purpose of said meeting having been given to the stockholders of said company, by publication for four consecutive weeks in the Cincinnati Commercial Gazette, a daily newspaper in general circulation in said county of Hamilton; the holders of all the capital stock of said company being present in person or by proxy.

Mr. Boyle was on motion elected chairman and Mr. Doherty secretary of said meeting, whereupon Mr. O'Connor offered the following resolution :

"Resolved, That the line of road of The Cincinnati Inclined Plane Railway Company be and the same is hereby extended beyond its present northern terminus in Hamilton County to the village of Glendale in said county."

Which on motion of Mr. Littell was adopted by the vote of all present representing all the capital stock of said company.

On motion of Mr. O'Connor the President and Directors of the company were instructed to sign and transmit under its corporate seal the following certificate to the Secretary of State of the State of Ohio:

Office of The Cincinnati Inclined Plane Railway Company.

CINCINNATI, February 23rd, 1889.

To the Secretary of State of the State of Ohio.

The undersigned being the President and Directors of The Cincinnati Inclined Plane Railway Company, hereby certify that at a meeting of the stockholders of said company held at its offices in

Cincinnati on the 23rd day of February, 1889, at 10 o'clock a. m., called by the President and Board of Directors of said company for the purpose of voting upon the question of extending the company's line of road beyond its present northern terminus in Hamilton County to the village of Glendale, in the same county, notice of that time, place and purpose of said meeting having been given to the stockholders of said company, by publication for four consecutive weeks in the Cincinnati Commercial Gazette, a daily newspaper in general circulation in said county of Hamilton, the holders of all the capital stock of said company voted in favor of said extension.

In witness whereof the undersigned, the President and Directors,
 363 have hereunto set their hands and caused the seal of said
 company to be hereto affixed this — day of February, A. D.
 1899.

(Signed)

[SEAL.]

H. H. LITTELL,

President;

ST. JOHN BOYLE,

HENRY PEACHY,

E. V. CHERRY,

W. I. O'CONNOR,

H. M. LITTELL,

J. M. DOHERTY,

Directors.

Attest:

J. M. DOHERTY, *Secretary.*

Mr. Littell offered the following preamble and resolution:

Whereas, The Board of Directors of this company have made application to the Commissioners of Hamilton County, Ohio, for permission to use and occupy with single or double tracks with the necessary turnouts and with the necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage Turnpike, commencing at a point at or near its intersection with Ludlow Avenue, and running thence upon and along the said Carthage Turnpike to its northern terminus at or near the County Fair Grounds at Carthage, so as to enable this company to furnish continuous rapid and safe transportation between Fountain Square in Cincinnati and the village of Carthage in this county, which said application is now pending; therefore be it

Resolved, That the said action of the Board of Directors be and the same is hereby ratified and approved, and said Board is hereby authorized to accept the said grant from the County Commissioners and to construct said extension, which on motion was unanimously adopted.

On motion it was ordered that the secretary transmit to the Board of County Commissioners of Hamilton County a certified copy under the seal of the company, of the foregoing action of the stockholders' meeting.

[SEAL.]

H. H. LITTELL, *President.*

Attest:

J. M. DOHERTY, *Secretary.*

Office of the Cincinnati Inclined Plane Railway Company.

CINCINNATI, February 23rd, 1889.

I hereby certify that the above is a true copy of the proceedings of the stockholders and directors of this company at their meeting held this day.

In witness whereof I have hereunto set my hand and the seal of the company this February 23rd, 1889.

J. M. DOHERTY, *Secretary.*

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CINCINNATI, January 7th, 1902.

I, Geo. C. Zimmermann, Clerk of the Board of County Commissioners of Hamilton County, Ohio, hereby certify that the foregoing is a true and correct copy of a document on file in my office, received from The Cincinnati Inclined Plane Railway Company by said board.

Witness my hand and seal on the day and year aforesaid.

GEO. C. ZIMMERMANN,

Clerk Board of Hamilton County Commissioners.

(Endorsed on back:) June 1, 1903. We have no objections to this bill of exceptions. E. W. Kittredge, Wallace Burch, J. W. Warrington, for Defendant.

Amended Reply to the Amendment to the Answer and Additional Answer of the Millcreek Valley Street Railroad Company.

(Filed June 11, 1903.)

Now comes the plaintiff, and for amended reply to the amendment to the answer and additional answer of The Millcreek Valley Street Railroad Company, filed March 2, 1903, says that shortly before the first day of January, 1889, the northern boundary line of the city of Cincinnati where the same crosses Vine street, was coterminous with the northern end of the line of railway construction upon Vine street under the ordinance passed by the city council of the city of Cincinnati on the 27th day of October, 1875, referred to in the original answer of The Cincinnati Street Railway Company herein, which line was also the southern boundary line of the property of the Zoological Land Syndicate; about that time and prior to the first day of February, 1889, the property owned by the Zoological Land Syndicate was annexed to the city of Cincinnati; and on the 6th day of April, 1889, when the deed executed on behalf of the Zoological Land Syndicate set forth as Exhibit 5 in the said amendment to answer filed March 2, 1903, was executed, the land described therein as owned by the Zoological Land Syndicate was within the corporate limits of the city of Cincinnati.

Plaintiff further says that the application of The Cincinnati Inclined Plane Railway Company which was granted by the Board

of County Commissioners of Hamilton County on the 23rd day of March, 1889, as stated in the transcript from the records
365 of said Board of County Commissioners attached to said amendment to answer filed March 2, 1903, as Exhibit 4 thereof, was an application to extend the line of railway then and theretofore operated by The Cincinnati Inclined Plane Railway on Vine street to the village of Carthage; and that said Commissioners thereby gave their consent as the public officers having the control and management of said Carthage Turnpike to the construction of such extension; and said portion of the Carthage Turnpike from the point where the same was intersected by said line of railroad as it emerged from the lands of the Zoological Land Syndicate northwardly to Mitchell Avenue, was as to the east half thereof then within the village of Avondale, and as to the west half thereof within the village of Clifton. North of said villages of Avondale and Clifton said Carthage Turnpike ran through the village of St. Bernard. North of said village of St. Bernard at the time said action was taken by said Board of County Commissioners, said Carthage Turnpike ran through territory which was not part of any municipal corporation until the same reached the village of Carthage, a distance of about half a mile; said unincorporated territory has since been incorporated into a municipal corporation by the name of Elmwood Place. All of said villages were and have since continued to be municipal corporations under the laws of Ohio, excepting said villages of Avondale and Clifton, which, on or about the first day of January, 1895, were annexed to said city of Cincinnati.

Plaintiff further says that prior to the passage of the resolution by the council of the village of Carthage on March 19, 1889, as set forth in Exhibit 9 attached to said amendment to answer filed March 2, 1903, said The Cincinnati Inclined Plane Railway Company had represented to the council of said village that their purpose in obtaining the permission to occupy the Carthage Pike was for an extension of their then existing line in the city of Cincinnati, and that said resolution was passed upon the faith of such representation.

Plaintiff further says that while it is true that the city of Cincinnati was a party defendant to the action brought by The Louisville Trust Company against The Cincinnati Inclined Plane Railway Company in cause No. 4859, in the Circuit Court of the United States for the Southern District of Ohio, Western Division, it is not true that said city of Cincinnati filed its answer in said cause, nor was there any occasion for said city to file any answer in said cause, as no relief was prayed against said city of Cincinnati in any bill of complaint or cross-bill of complaint filed in said cause. Plaintiff further says that on the 12th day of October, 1895, said Louisville Trust Company filed its bill of complaint in said cause, seeking to foreclose the lien of a mortgage held by it upon the entire line of railroad operated by said The Cincinnati Inclined Plane Railway

Company from Fountain Square in the city of Cincinnati to
366 and through the village of Carthage; and no claim was made, nor was any question presented before that court in that cause, as to the validity or invalidity, or the legal effect of the various

alleged grants and rights of The Cincinnati Inclined Plane Railway Company to maintain and operate any line of railway beyond the terminus of that described in said ordinance of the city of Cincinnati passed on the 27th day of October, 1875, or as to the rates of fare to be charged to passengers passing from the city of Cincinnati to and upon the line extending beyond the terminus of the line described in said ordinance, or vice versa, or as to the rates of fare to be charged upon any portion of the line operated by said Cincinnati Inclined Plane Railway Company.

And referring to the agreement between The Cincinnati, Hamilton, Middletown & Dayton Street Railway Company and The Cincinnati Street Railway Company, attached as Exhibit No. 14 to said amendment to answer filed March 2, 1903, by which the cars southwardly from the entrance to the Zoological Garden are to be operated by The Cincinnati Street Railway Company, plaintiff further says that as such cars are operated, they do not follow and pursue any established route which has been granted to The Cincinnati Street Railway Company, and that in so operating said cars and collecting fares therefor, the defendants and each of them are acting without authority of law.

Wherefore the plaintiff prays as in its original petition herein and the amendment thereto.

SAM'L W. BELL,
JOHN R. SAYLER,
SAMUEL B. HAMMEL,
WM. WORTHINGTON,
Attorneys for Plaintiff.

Motion for a New Trial.

(Filed January 6, 1904.)

Now comes the plaintiff, and moves the court to vacate and set aside the findings and judgment herein, and to grant a new trial of this cause, for the following reasons, to-wit:

1. The court erred in excluding evidence offered by the plaintiff, to which rulings the plaintiff excepted at the time.

2. The court erred in receiving evidence offered by the defendants and objected to by the plaintiff, to which rulings the plaintiff excepted at the time.

3. Other errors of law occurring at the trial excepted to by the plaintiff.

4. That the judgment is contrary to law.

367-394 5. That the judgment is not sustained by sufficient evidence.

SAM'L W. BELL,
SAMUEL B. HAMMEL,
JOHN R. SAYLER,
WM. WORTHINGTON,
Attorneys for Plaintiff.

* * * * *

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EXHIBIT "2."

Amendment of Articles of Incorporation.

Office of The Cincinnati Inclined Plane Ry. Co.

CINCINNATI, February 23, 1889.

To the Secretary of State of the State of Ohio:

The undersigned, being the president and directors of the Cincinnati Inclined Plane Railway Company, hereby certify that at a meeting of the stockholders of said company, held at its office in Cincinnati on the 23d day of February, 1889, at 10 o'clock a. m., called by the president and board of directors of said company, for the purpose of voting upon the question of extending the company's line of road beyond its present northern terminus in Hamilton county to the village of Glendale, in the same county, notice of the time, place and purpose of said meeting having been given to the stockholders of said company by publication for four consecutive weeks in the Cincinnati Commercial Gazette, a daily newspaper in general circulation in said county of Hamilton, the holders of all the capital stock of said company voted in favor of said extension.

In witness whereof the undersigned, the president and directors, have hereunto set their hands and caused the seal of said
396 company to be hereunto affixed this 23d day of February, 1889.

[CORPORATE SEAL.]

H. M. LITTELL, *President*.

Attest:

J. M. DOHERTY, *Sect'y*.

ST. JOHN BOYLE,
M. J. O'CONNOR,
H. M. LITTELL,
J. M. DOHERTY,
H. PEACHEY,
JOSEPH S. HILL,
E. V. CHERRY, *Directors*.

(Duly certified.)

EXHIBIT "3."

An ordinance authorizing the extension of the Cincinnati Inclined Plane Railway from the head of Main street to Fifth Street Market Space.

(Passed December 1, 1871.)

SECTION 1. Permission to lay tracks on certain streets.

Conditions: Be it ordained, etc., that permission is hereby granted to the Cincinnati Inclined Plane Railway Company to lay a double

track from a point at or near the head of Main street, on the north side of Mulberry street; thence south along Main street to Liberty street; thence west on Liberty street to Walnut street; thence south on Walnut street to Fifth Street Market Space; thence east on Fifth Street Market Space; said tracks to be laid upon the following terms and conditions:

1. They shall occupy the center of the street, each track to have the same relative position to the curb and center line of the street; and the tracks shall be of a gauge of five feet two inches, and shall be placed as near together as practicable, allowing for the safe and convenient passage of cars thereon. The crown and slope of the said streets shall be made to conform to the levels which may be given by the city civil engineer; and if in his opinion, it shall be considered necessary to take up the whole pavement from curb to curb to obtain the proper form and grade of such crown, the same shall be done at the joint expense of said railroad company and the city, in the proportion of one-fourth to the said company
397 and three-fourths to the said city; and in case it is deemed proper by the city authorities at any time to change the grade of any street through which said road may pass, the said company shall be bound to relay its tracks in accordance with such changed grades at its own expense immediately after receiving notice from the city civil engineer to do so. Wherever it may be necessary to take up and relay an existing track it shall be the duty of said company, and it is hereby authorized, at its own expense, to take up and relay such track in its present good order and in its proper relation to the center of the street. The rail to be used to be of the most improved kind and to be put down in such manner as to leave the surface of the street as nearly level as possible. The pattern and style of the rail to be submitted to the city civil engineer, and to be approved by him before being placed on the street.
2. Before using any of the existing tracks the said company shall tender or pay to the person or company owning the same an equal proportion of the cost of laying such tracks, and shall thereafter bear an equal proportion of the expense of keeping the same in repair.
3. The said company shall lay and keep in repair between the rails a suitable wooden pavement, to be approved by the city civil engineer.
4. No motive power except horses and mules shall be used on said tracks.
5. The charges for transportation over said portion of said company's line shall not exceed five cents for each passenger, and the said company shall keep for sale and sell upon its cars tickets in packages of twenty-five for one dollar.
6. Before the said company shall commence the construction of said tracks, it shall obtain the consent of a majority in interest of the owners of property abutting thereon.
7. The said company shall pay and save the city harmless from any damages for which it may be liable for any injury to persons or property on account of the grant made under this ordinance.

EXHIBIT "4."

An ordinance authorizing the extension of the Cincinnati Inclined Plane Railway from the Inclined Plane to the north corporation line at the Zoological Garden.

398

(Passed October 27, 1875.)

SECTION 1. Permission to lay tracks on certain streets granted.

Conditions: Be it ordained, etc., that permission is hereby granted to the Cincinnati Inclined Plane Railway Company to use and occupy for a period of thirty (30) years, with a double track, Locust street, commencing at the Inclined Plane, thence north to Mason street, and Mason street from Locust east to Auburn street, and Auburn street with a single track from Mason street northerly to Vine street, and Vine (formerly Washington) street by a double track to the corporation line of the city of Avondale, with the privilege of using any tracks which may be laid by any other company, or if none are laid, then with the privilege of laying tracks to be used in common with other roads until said Vine street north of Hammond shall be suitably improved, on Hammond or St. Clair streets to the Carthage pike or Ludlow avenue, and on said avenue to the corporation line; and upon said Vine street being suitably improved said company shall lay their tracks thereon, and the occupancy or use of any tracks above provided for west of Vine street shall cease. Said tracks to be laid upon the following terms and conditions:

First. They shall occupy the center of the street, each track to have the same relative position to the curb and center line of the street, and the tracks shall be of a gauge of five (5) feet two (2) inches, and shall be placed as near together as practicable, allowing for the safe and convenient passage of cars thereon. Wherever it may be necessary to take up and relay an existing track, it shall be the duty of said company, and it is hereby authorized, at its own expense, to take up and relay such track in its present good order and in its proper relation to the center of the street, and such portion of the street as is disturbed by said company in the laying of its tracks, shall be put in good repair at its own expense. The rails to have an inside tram of not less than three inches, and to be submitted to the city civil engineer, and to be approved by him before being placed in the street.

Second. Before using any of the existing tracks the said company shall tender or pay to the persons or company owning the same an equal proportion of the costs of laying such tracks, and shall thereafter bear an equal proportion of the expense of keeping the same in repair.

399 Third. No motive power except horses and mules shall be used on said tracks.

Fourth. The charges for transportation over said portion of said company's lines shall not exceed five (5) cents cash, nor more than one ticket for each passenger, and the said company shall keep for sale and sell on the cars run on said portion tickets in packages of twenty-five (25) for one dollar, and shall also furnish on its cars

through single tickets good for one passage to or from the Zoological Garden and the corner of Fifth and Main streets for ten cents.

Fifth. Before the said company shall commence the construction of said tracks it shall obtain the consent of a majority in interest of the owners of property abutting thereon.

Sixth. The said company shall pay and save the city harmless from any damage for which it may be liable for any injury to persons or property on account of the grant made under this ordinance, and said company shall pay such car license as may be fixed by future ordinance; provided, however, that the council shall have, and it hereby reserves the power, to grant to any company or individual, or any number of companies or individuals, the right to occupy and use so much of the tracks aforesaid as shall be placed, and also the tracks and turn-outs which are now in use in Vine street, between Corry and St. Clair streets, whether that be more or less than one-tenth of this line or route; but the expense of laying and keeping in repair such portion of said tracks shall be borne equally by all those using the same; and further provided, that this ordinance shall not take effect, nor any rights hereunder vest, until and unless the Cincinnati Inclined Plane Railway Company shall file with the City Auditor its acceptance of the same, and also procure and file with said Auditor the consent of the owners of the tracks and turn-outs in Vine street, between Corry and Hammond streets, to the use as above provided of said tracks and turn-outs.

(As read into the record.)

400

EXHIBIT "5."

CINCINNATI, January 22, 1889.

To the Honorable the Board of County Commissioners of Hamilton County, Ohio.

GENTLEMEN: The Cincinnati Inclined Plane Railway Company is now adapting its route from Fifth and Walnut streets to the Zoological Garden so as to operate the same by electricity, and is desirous of extending the same from its present terminus to the Hamilton County Fair Grounds at Carthage, so as to furnish continuous, rapid and safe transportation between Fountain Square in Cincinnati and the village of Carthage in this county, and therefore petitions your honorable body for permission to use and occupy with double or single tracks, with the necessary turnouts, with the necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage turnpike, commencing at a point at or near its intersection with Ludlow avenue and running thence upon and along said Carthage turnpike to its northern terminus at or near the county fair grounds at Carthage.

Very respectfully,

[SEAL.]

H. M. LITTELL, *President.*

Attest:

J. M. DOHERTY, *Secretary.*

(As read into the record).

EXHIBIT "6."

Office of the Cincinnati Inclined Plane Railway Company.

CINCINNATI, February 23, 1889.

At a meeting of the stockholders of the Cincinnati Inclined Plane Railway Company held at its office in Cincinnati on the 23d day of February, 1889, at 10 o'clock a. m., called by the president and directors of said company for the purpose of voting upon the question of extending the company's line of road beyond its present northern terminus in Hamilton county to the village of Glendale in the same county, and for such other business as might be brought before the meeting; notice of time, place and purpose of said meeting having been given to the stockholders of said company
401 by publication for four consecutive weeks in the Cincinnati Commercial Gazette, a daily newspaper in general circulation in said county of Hamilton, the holders of all the capital stock of said company being present in person or by proxy. Mr. Boyle was on motion elected chairman and Mr. Doherty secretary of said meeting. Whereupon, Mr. O'Connor offered the following resolution:

Resolved, That the line of road of the Cincinnati Inclined Plane Railway Company be and the same is hereby extended beyond its present northern terminus in Hamilton county to the village of Glendale in said county.

Which, on motion of Mr. Littell, was adopted by the vote of all present, representing all the capital stock of said company.

On motion of Mr. O'Connor the president and directors of the company were instructed to sign and transmit under its corporate seal the following certificate to the Secretary of State of the State of Ohio:

"Office of The Cincinnati Inclined Plane Railway Company.

"CINCINNATI, February 23, 1889.

"To the Secretary of State of the State of Ohio:

"The undersigned, being the president and directors of the Cincinnati Inclined Plane Railway Company, hereby certify that at a meeting of the stockholders of said company, held at its office in Cincinnati on the 23d day of February, 1889, at ten o'clock a. m., called by the president and board of directors of said company, for the purpose of voting upon the question of extending the company's line of road beyond its present northern terminus in Hamilton county to the village of Glendale in the same county, notice of the time, place and purpose of said meeting having been given to the stockholders of said company by publication for four consecutive weeks in the Cincinnati Commercial Gazette, a daily newspaper in general circulation in said county of Hamilton, the holders of all the capital stock of said company voted in favor of said extension.

"In witness whereof the undersigned, the president and directors,
have hereunto set their hands and caused the seal of said
402 company to be affixed this — day of February, A. D. 1889.
"(Signed) H. M. LITTELL,

"President,

"ST. JOHN BOYLE,
"HENRY PEACHEY,
"E. V. CHERRY,
"M. J. O'CONNOR,
"H. M. LITTELL,
"J. M. DOHERTY,

"Directors.

"Attest:

"J. M. DOHERTY, *Secretary.*"

Mr. Littell offered the following preamble and resolution:

Whereas, The board of directors of this company have made application to the Commissioners of Hamilton County, Ohio, for permission to use and occupy with double or single tracks, with the necessary turn-outs and with the necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage turnpike, commencing at a point at or near its intersection with Ludlow avenue, and running thence upon and along said Carthage turnpike to its northern terminus at or near the county fair grounds at Carthage so as to enable this company to furnish continuous, rapid and safe transportation between Fountain Square in Cincinnati and the village of Carthage in this county, which said application is now pending; therefore be it

Resolved, That the said action of the board of directors be and the same is hereby ratified and approved, and said board is hereby authorized to accept the said grant from the County Commissioners and to construct said extension.

Which on motion was unanimously adopted.

On motion it was ordered that the secretary transmit to the Board of Commissioners of Hamilton County a certified copy under the seal of the company of the foregoing action of the stockholders' meeting.

H. M. LITTELL, *President.*

Attest:

J. M. DOHERTY, *Secretary.*

403 Office of The Cincinnati Inclined Plane Railway Company.

CINCINNATI, February 23, 1889.

I hereby certify that the above is a true copy of the proceedings of the stockholders and directors of this company at their meeting held this day. In witness whereof I hereunto set my hand and the seal of this company on this February 23, 1889.

J. M. DOHERTY, *Secretary.*

* * * * *

EXHIBIT "8."

CINCINNATI, January 28th, 1889.

To the Honorable the Board of Councilmen of the Village of Carthage, Ohio:

The Cincinnati Inclined Plane Railway Company has made application to the Board of County Commissioners of Hamilton County for permission to occupy with double or single tracks, with the necessary turn-outs and with the necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage turnpike to its northern terminus at or near the county fair grounds at Carthage, so as to enable the said company to furnish continuous, rapid and safe transportation by electricity from the Fountain Square in Cincinnati to the village of Carthage, and now petition your honorable body for permission to occupy and operate its railroad through your village as above contemplated.

THE CIN. INC. PLANE RY. CO.,
By H. M. LITTELL, *Pres'd't.*

Attest:

J. M. DOHERTY, *Sect'y.*

EXHIBIT "9."

Office of The Cin. Inc. Plane Ry. Co.

CINCINNATI, February 11, 1889.

To the Honorable Council of Carthage:

GENTLEMEN: Our application to the County Commissioners for permission to extend our road from its present terminus at the Zoological Garden to the village of Carthage is opposed by an application from the Cincinnati Suburban R. R. Co., represented by Mr. McCrea. The Commissioners can by a simple resolution give us the right to go ahead, as it will be an extension of an existing road, but in the case of our opponents a route must be established, bids advertised for, and acted upon, all making the loss of much time, and probably ending in injunction and litigation preventing for a long time to come the construction of any road.

We do not believe our opponents are in a condition to construct a road to the center of Cincinnati, but expect to depend upon any arrangement they can make with some existing road, either to buy out their grant or carry their passengers.

This company makes the plain proposition to extend their electric road to Carthage and run the same car from Fountain Square in Cincinnati through the Zoological Garden to Carthage, and intend to construct the road as soon as their right to do so is obtained.

We think it very desirable that the citizens and Council of Carthage should declare their preference, as between the two applica-

tions, in unmistakable terms, and notify the Commissioners at their meeting upon Wednesday a. m. next.

THE CINCINNATI INCLINED PLANE
RY. CO.,

By J. M. DOHERTY, *Sect'y.*

(As read into the record.)

EXHIBIT "10."

To the Mayor and Council of the Village of Carthage, Hamilton County:

GENTLEMEN: The Cincinnati Inclined Plane Railway Company hereby requests permission to extend its tracks over and along Lockland avenue and Main street of said village from the northern terminus of the Carthage pike to the north corporation line of said village, and to construct its railway and operate its cars by means of electricity over said street, together with all necessary turn-outs, appendages and appurtenances incident to the proper operation of its railway system, and respectfully ask your honorable board to grant the same.

Very respectfully,

THE CINCINNATI INCLINED PLANE
RAILWAY CO.,

By H. P. BRADFORD, *General Manager.*

(In pencil on the edge of it, it is dated August 7, 1894.)

* * * * *

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EXHIBIT 12.

[This map of the City of Cincinnati is not reprinted here, as substantial copies are filed with the Clerk.]

409

EXHIBIT "12a."

August 16, 1904.

To the Honorable the Mayor and Council of the Incorporated Village of Carthage.

GENTLEMEN: This is to advise you that in compliance with the terms of an ordinance entitled an ordinance No. —, "To provide for the extension of the Cincinnati Inclined Plane Railway from the northern terminus of the Carthage pike, over Main street and Lockland avenue, to the north corporation line of the village of Carthage," the Cincinnati Inclined Plane Railway Company hereby accepts the terms and conditions of said ordinance.

Respectfully,

THE CINCINNATI INCLINED PLANE
RAILWAY CO.,

(Signed) Per H. P. BRADFORD, *Gen'l Mgr.*

Know All Men by These Presents:

That the Cincinnati Inclined Plane Railway Company, as principal, and Oliver Kinsey, as surety, are held and firmly bound unto the incorporated village of Carthage in Hamilton county, Ohio, in the sum of twenty-five hundred dollars, for the payment of which well and truly to be made the obligors hereto jointly and severally bind themselves, their successors, heirs and assigns firmly by these presents.

Signed at Cincinnati, Ohio, this 17th day of August, 1894.

The condition of the above obligation is such, that,

Whereas, on the 7th day of August, 1894, the council of the incorporated village of Carthage duly passed an ordinance entitled ordinance No. —, "To provide for the extension of the Cincinnati Inclined Plane Railway from the northern terminus of the Carthage pike, over Main street and Lockland avenue, to the north corporation line of the village of Carthage"; and

Whereas, by the tenth paragraph of said ordinance it is provided that—

Tenth. Within thirty days after the passage of this ordinance said company shall file its written acceptance of the terms and conditions of the same, and give a bond satisfactory to the council (and to the village solicitor as to form) in the sum of twenty-five hundred dollars (\$2,500.00), conditioned for the faithful compliance of said company with all the terms and conditions of this ordinance, and to save the village harmless from any and all claims by reason of the construction and operation of this extension; and

Whereas, said company has filed its written acceptance of the terms and conditions of said ordinance,

Now, therefore, if the said the Cincinnati Inclined Plane Railway Company shall faithfully comply with all the terms and conditions of said ordinance and save the village of Carthage harmless from any and all claims by reason of the construction and operation of said extension, then this obligation to be void.

THE CINCINNATI INCLINED PLANE
RAILWAY CO.,

(Signed) By H. P. BRADFORD, *General Manager*.
(Signed) OLIVER KINSEY.

Attest:

J. D. DE WITT.

Approved as to form.

S. B. HAMMEL, *Solicitor*.

August 21, 1894.

(Duly certified.)

(As read into the record.)

EXHIBIT "13."

On motion the following was ordered and entered:

In the matter of the petition to detach certain territory from the village of Avondale and annex the same to the city of Cincinnati, on application of the petitioners it is ordered by the commissioners that the description of the territory in said petition and plat thereto attached be and the same is hereby amended by running the northerly line of said territory to and along the easterly line of the Carthage turnpike instead of the center of said pike.

(That was passed by three votes.)

By Mr. ANTHONY:

Resolved, That the prayer of the petitioners for the detachment of certain territory in the village of Avondale, and to annex the same to the city of Cincinnati, be granted, and the following spread upon the minutes:

411 This day the matter of the application to detach certain territory from the village of Avondale and annex the same to the city of Cincinnati came on for hearing before the County Commissioners upon the petition and plat thereto attached, and the amendment thereto, the resolution of the common council of said city, the proof of the publication of notice, the affidavit of H. B. Hastings as to application of the petitioners heretofore filed, and other evidence, and argument of counsel.

On consideration whereof the Commissioners find as follows:

That due notice of the time and place where said petition should be heard has been given by publication of the same in the Cincinnati Commercial Gazette, a newspaper printed and of general circulation in the county of Hamilton, Ohio, for a period of six consecutive weeks commencing on September 8, 1887, and also by being posted for the same period in two conspicuous places within the limits of said territory; that no person has appeared to object to the granting of said petition; that the said city and village adjoin each other; that the said city has duly made application for the detaching of said territory described in said petition from said village and annexing the same to said city; that the subscribers to said petition are inhabitants of said territory and comprise more than two-thirds of the legal voters inhabiting the same; that said petition contains all the matters required by law and that its statements are true; that the plat hereto attached is an accurate plat of said territory, and said territory is accurately described in said petition as amended as follows, to-wit:

That part of section 15 in Millcreek township, Hamilton county, Ohio, within the limits of the village of Avondale in said county, described as follows, viz.: Commencing on the south line of section 15 at a point which is the southeast corner of the Zoological Garden; thence along the north line to Forest avenue, westerly along Forest avenue to the west line of the Cincinnati & Spring Grove Avenue Narrow Gauge Railroad; thence northwestwardly along the said west line of said railroad with the courses and distances thereof as

projected and partly constructed to the eastern line of the Carthage turnpike; thence southwardly along the said easterly line of the Carthage turnpike, with the courses and distances thereof, to the said south line of section 15; thence eastwardly along the said south line of section 15 to the place of beginning.

It is therefore considered and ordered by the commissioners that the prayer of said petition be and the same is hereby granted; that the alteration requested in said application in the petition be made; that the boundaries of said city and said village respectively be and the same are hereby established in accordance with such application and petition, and that the territory therein and above described shall hereafter constitute a part of said city of Cincinnati.

And this board coming now to ascertain and apportion the amount of the existing indebtedness of the said village of Avondale, which shall be assumed and paid by the city of Cincinnati, as provided by Section 1615 of the Revised Statutes, and finding that the total valuation of real and personal property in said village amounts to \$2,769,487, and that the total valuation of the real and personal property in said territory annexed amounts to \$130,000, and that the total bonded indebtedness of said village amounts to \$126,000, it is therefore ordered that the amount of such indebtedness which shall be assumed and paid by said city shall be the sum of \$5,000; which was carried by unanimous vote.

Minutes in Volume 18, page 74, of the minutes of date January 7, 1888.

EXHIBIT "14."

An Act to Incorporate the Town of Clifton, in the County of Hamilton.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That so much of the township of Millcreek, in the county of Hamilton, as is comprised within the following boundaries, to-wit, so much of sections twenty-two, twenty-one, fifteen, and of the south half of sixteen, in the third township and second fractional range of townships of the Miami Purchase as lie south and east of the Miami canal, and west of the center of the Cincinnati and Carthage turnpike road, be and the same is hereby created into and constituted a town corporate with perpetual succession, to be known and designated by the name of Clifton; and the same shall in all respects be governed, except as hereinafter provided, by the provisions of an act entitled "an act for the regulation of incorporated towns," passed February 16, 1839, and the several acts amendatory thereto.

SEC. 2. That the corporate limits of said town shall compose one school district until it shall be subdivided by the town council into two or more districts; and in each district three directors shall be elected, and said school or schools, directors and districts shall enjoy all the privileges and be subject to and have the benefit of all laws

and parts of laws regulating, affecting or controlling the common schools in the city of Cincinnati.

SEC. 3. That the town council shall have power by ordinance to suppress and abate all brothels, gambling houses, drinking houses and other nuisances; and, also, by ordinance, upon the petition of persons owning a majority of the feet fronting upon the line of any street, avenue, road, lane or alley, or any section thereof, to improve the same by straightening, widening, grading, regrading, macadamizing, paving and repairing the same, or any part or section, or parts or sections thereof, and to assess the cost of improvements as nearly equally as possible upon the property fronting upon such street, avenue, road, lane or alley, which assessments shall be a lien upon the land so assessed; and the same may be collected by suit at law, or in chancery, in the name of the corporation, against the owner of such property, in any court having competent jurisdiction, and, also, by ordinance, on petition of persons owning a majority of the feet fronting on the line of any proposed street, avenue or alley, to open the same, and to appropriate to public use the land over which such street, avenue or alley so opened may pass, first making due provision for payment to the owners of such land, compensation in money, for the value of the land so appropriated.

SEC. 4. That the first election under this act shall be held on the first Monday in April, 1850, and thereafter at such times as said corporation may designate; and all elections shall be conducted according to the provisions of the act of 16th February, 1839, heretofore referred to; and all parts of said act of 16th of February, 1839, and of the acts amendatory thereto, inconsistent with the provisions of this act are hereby suspended so far as the same affects this act.

SEC. 5. That said town council shall not have power to license any person or persons to keep any tavern, coffee house or
414-418 other place of resort for the sale of spirituous liquors, cider, vinous, fermented or malt liquors, or any intoxicating drinks; and they are hereby authorized to pass such ordinances to prevent and to impose such fines and penalties to punish all persons who may engage in keeping such houses or places of resort; and it shall be the duty of the mayor, upon information, to issue his warrant to bring all offenders against the ordinances of said town council before him for a hearing, and upon conviction to impose upon such offenders such fines and penalties as may be imposed by such ordinances, together with the costs of prosecution.

SEC. 6. This act shall take effect from and after its passage.

BENJAMIN F. LEITER,
Speaker of the House of Representatives.
CHARLES C. CONVERS,
Speaker of the Senate.

March 23, 1850.

* * * * *

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EXHIBIT "17."

Minutes of February 12th, 1889.

A communication of the electric railway company was read and on motion received and filed.

On motion of Mr. Phillips the following resolution was adopted:

"Whereas, this council at a special meeting held on the 29th day of January, 1889, adopted certain resolutions in reference to the construction of an electric street railway over the Carthage turnpike from Cincinnati to Carthage; and

"Whereas, upon full investigation we are satisfied that the Cincinnati Inclined Plane Railway Company are now operating a railroad to the Zoological Garden, which they propose to extend to Carthage, and which, if so extended, will furnish to our citizens the most direct and shortest route to and from the city: therefore

"Resolved, That the honorable Board of County Commissioners be and are hereby requested to grant the right of way to said Cincinnati Inclined Plane Railway Company to construct an electric street railway over the said Carthage turnpike as asked in the application to said County Commissioners."

420 On motion the Mayor was chosen a member of committee to present resolution to County Commissioners at their meeting February 13, 1889.

I, Lewis Hall, Clerk of the village of Carthage, Ohio, do hereby certify that the foregoing is a true and correct copy of a resolution adopted and action taken by the council of the village of Carthage at a meeting held February 12th, 1889, in reference to the electric railway, as shown by the minutes of said meeting of council at pages 146 and 151 of the village records, preserved in my office.

Witness my hand and seal this 3d day of January, 1903.

[SEAL.]

LEWIS HALL,

Village Clerk.

EXHIBIT "18."

COUNCIL CHAMBER,
CARTHAGE, OHIO., January 29th, 1889.

Pursuant to a call by the Mayor the board met to take some action in regard to the proposed electric railway, and upon roll call the following members answered:

Helfrich, Knapp, Krais, Kister, Morris, Phillips.

The following communication was received and read and ordered spread on the minutes:

"CINCINNATI, OHIO, January 28th, 1889.

"To the Honorable Board of Council, Village of Carthage:

"The Cincinnati Inclined Plane Railway Company has made application to the Board of County Commissioners of Hamilton County

for permission to occupy with double or single tracks, with the necessary turn-outs, appendages and appurtenances of an overhead electric street railway system, the Carthage turnpike to its northern terminus at or near the county fair grounds at Carthage, so as to enable the said company to furnish continuous, rapid and safe transportation by electricity from the Fountain Square in Cincinnati to the village of Carthage, and now petition your honorable body for permission to occupy and operate its railroad through your village as above contemplated.

"(Signed)

THE CINCINNATI INCLINED PLANE
RAILWAY CO.

"Attest:

"J. M. DOHERTY, *Sec'y.*"

421 The following resolution was presented and on motion adopted unanimously:

Whereas the Cincinnati Inclined Plane Railway Company has made application to the Board of County Commissioners of Hamilton County for right of way over the Carthage turnpike for an electric street railway, as well as to this body, for permission to occupy the streets of the village for the same purpose; therefore

Resolved, that the application to this board be received and spread on the minutes.

Resolved, that rapid and cheap continuous transit to and from the city of Cincinnati and intermediate points is desirable and would prove beneficial to the citizens of this village.

Resolved, that upon proper assurances of good faith and a speedy completion of the enterprise this body should take such further action as may be proper and mutually beneficial to all concerned.

Resolved, that the Commissioners of Hamilton County are hereby requested to take such immediate action as may be proper to promote the early completion of so worthy an enterprise.

On motion of Mr. Phillips the Clerk was instructed to certify a copy of the foregoing resolution to the County Commissioners and the Inclined Plane Railway Company.

On motion the board adjourned.

JAS. E. BRODERICK, *Mayor.*

E. E. ROSS, *Clerk.*

I hereby certify that the foregoing is a true copy of the minutes of council of the village of Carthage, Ohio, as they appear of record in Record Book No. 3, pages 142 and 143.

Witness my hand and seal this 23d day of November, A. D. 1903.

[SEAL.]

LEWIS HALL,
Village Clerk, Carthage, Ohio.

EXHIBIT No. 19.

Vol. 18, Page 490, County Commissioners' Minutes, February 13, 1889.

Petitions were received and read from citizens of St. Bernard, Elmwood and Carthage, and also certified copy of ordinance
422 adopted by the Village Council of Carthage, requesting this board to grant The Mt. Auburn Inclined Plane Railway Company the right to construct a double track electric railway over the Carthage pike, and on motion the same were ordered filed.

"To the Honorable the Commissioners of Hamilton County, Ohio.

"GENTLEMEN: At a special meeting of Council, held on the 12th day of February, 1889, the following preamble and resolution were unanimously adopted, and a certified copy thereof ordered transmitted to your honorable board.

"Whereas, This Council, at a special meeting held on the 29th day of January, 1889, adopted certain resolutions in reference to the construction of an electric street railway over the Carthage turnpike, from Cincinnati to Carthage, and

"Whereas, Upon full investigation, we are satisfied that The Cincinnati Inclined Plane Railway Company are now operating a railroad to the Zoological Garden, which they propose to extend to Carthage, and which, if so extended, will furnish to our citizens the most direct and shortest route to and from the city; therefore

"Resolved, That the Honorable Board of County Commissioners be, and they are hereby requested to grant to said The Cincinnati Inclined Plane Railway Company the right of way to construct an electric street railway over the said Carthage turnpike, as asked in their application to said County Commissioners."

In testimony, I have hereunto set my hand and seal of office this 12th day of February, 1889.

E. E. ROSS,

Clerk of the Village of Carthage, Ohio.

(Duly certified.)

EXHIBIT 20.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the city of Cincinnati, Ohio, in said district on the first Tuesday of April, being also the seventh day of that month, in the year of our Lord one thousand eight hundred and ninety-six, and of the American Independence the one hundred and twentieth.

Present: The Hon. George R. Sage, District Judge, sitting and holding Circuit Court.

Among the proceedings had were the following, to-wit:

423 No. 4797. In Equity.

THE LOUISVILLE TRUST COMPANY, Complainant,
vs.
THE CITY OF CINCINNATI, Defendant.

Be it remembered, That heretofore, to-wit, on the 6th day of March, in the year of our Lord one thousand eight hundred and ninety-five, came the complainant by its solicitors and filed in the clerk's office of said court their certain Bill of Complaint against the defendant herein, said Bill of Complaint is clothed in the words and figures following, to-wit:

Bill of Complaint.

In the Circuit Court of the United States for the Southern District of Ohio, Western Division.

No. 4797. In Equity.

THE LOUISVILLE TRUST COMPANY, Complainant,
vs.
THE CITY OF CINCINNATI, Defendant.

To the Honorable the Judges of the Circuit Court of the United States within and for the Southern District of Ohio, Western Division:

The Louisville Trust Company, a corporation organized and existing under the laws of the Commonwealth of Kentucky, and a citizen thereof, and having its principal place of business in the city of

Louisville, in said Commonwealth, brings this its Bill of Complaint against the city of Cincinnati, which said city is a municipal corporation existing under the laws of the state of Ohio, and a city of the first grade of the first class, and situate in said district of the Western Division thereof, and thereupon your orator, complaining of said defendant, the city of Cincinnati, says:

First. That the matter in dispute between your orator and the said defendant exceeds, exclusive of interest and costs, the value of five thousand dollars, and the cause of action which your orator has against said defendant and seeks to enforce in this cause is for the protection of certain contract and equitable rights, as hereinafter more fully set forth.

(Charter, Organization and Change of Name.)

424 Second. The Louisville Trust Company is a corporation created by an Act of the General Assembly of the state of Kentucky entitled, "An act to incorporate the Louisville Safety Vault & Trust Company," approved April 22, 1884, and by virtue of said act of incorporation it was provided that the said corporation might be appointed and might act as receiver, assignee or other trustee, whether appointed by deed, by last will and testament, by any court within this Commonwealth, or in any other manner not inconsistent with law; and that it might receive and hold in trust real and personal estate, and might accept and execute and guarantee all such trusts of every description not inconsistent with the laws of said state, as may be committed to it by any person or persons, or by any corporation, or by any court of record of this or any other state; and afterwards by an Act of the General Assembly of the Commonwealth of Kentucky entitled "An Act to amend an Act entitled to incorporate the Louisville Safety Vault & Trust Company," approved January 17, 1890, it was provided that the said act of incorporation should be amended as follows:

"That the corporate name be, and the same is hereby changed from The Louisville Safety Vault & Trust Company to The Louisville Trust Company, and by that name shall have perpetual succession and shall have and exercise all the powers given and granted in the original act of incorporation."

Third. That an indenture made and entered into on the 1st day of January, A. D., 1889, between The Cincinnati Inclined Plane Railway Company, a corporation organized and existing under the laws of the state of Ohio, as party of the first part, and said The Louisville Safety Vault & Trust Company, trustee as thereafter mentioned, party of the second part, reciting that at a called meeting of the stockholders of said Railway Company, duly convened and held on the 7th day of January, A. D., 1889, at the office of said Railway Company in the city of Cincinnati, due legal notice of said meeting having been first given, the following resolutions were passed:

(Resolutions of Stockholders.)

"Resolved, 1st. That in order to raise money for the purpose of renewing and repairing the company's inclined plane and its present street railway tracks, and for equipping the same with electric motive power and plant therefor and for the purpose of hereafter extending and adding to its lines of railway, and for the purpose of providing for the payment of the present outstanding issue of bonds and for taking up and canceling the lease of the Mt. Auburn Railway, and for paying off and discharging the floating debt of the company. That this company does hereby authorize the issue of its negotiable bonds to the amount of five hundred thousand dollars (\$500,000)

of the denomination of one thousand dollars (\$1,000) each, 425 numbered from one to five hundred, inclusive, bearing interest at the rate of 6 per centum per annum, payable semi-annually, for which coupons shall be attached, and which said bonds shall be dated the 1st day of January, A. D., 1889, and payable at the holder's option at the office of the company in Cincinnati, or its agency in the city of New York, on the 1st day of January, A. D. 1914, and that the terms and forms of such bonds and coupons shall be as follows:

Form of Bond.

The Cincinnati Inclined Plane Railway Company, incorporated under the laws of the state of Ohio, acknowledges itself indebted to The Louisville Safety Vault & Trust Company, trustee, or bearer, in the sum of one thousand dollars (\$1,000), to be paid on the first day of January, A. D. 1914, at the office of the company in the city of Cincinnati, Ohio, or at its agency in the city of New York, at the holder's option, with interest thereon at the rate of 6 per centum per annum, to be paid semi-annually on the first days of January and July in each year, at the same place, upon the presentation by the holder thereof of the proper coupon warrant, thereto attached for such interest. To secure the payment of such principal and interest the railways and property of said company now owned or to be hereinafter acquired have been pledged in pursuance of the laws of Ohio, as evidenced by a deed of trust or mortgage on the same, bearing even date, and herewith executed and delivered by the said company to the said trustee. This bond is one of a series of five hundred bonds of like amount, tenor and date, aggregating five hundred thousand dollars (\$500,000), equally secured by and issued subject to the provisions of the said mortgage, and it shall not be valid without the certificate of the said trustee thereon that it is one of the said bonds. And no stockholder of said company shall be individually liable for the principal or interest hereof.

In witness whereof, said Cincinnati Inclined Plane Railway Company has caused this bond to be signed by its president and its corporate seal to be thereto affixed.

Attested by its secretary, this 1st day of January, A. D., 1889.

And the form of said coupons shall be substantially as follows:

Form of Coupon.

On July 1, 1889, The Cincinnati Inclined Plane Railway Company will pay to bearer thirty dollars, at its office in Cincinnati, or its agency in New York, at his option, it being semi-annual interest on Bond No. —.

— — —, *Secretary.*

426 And the form of certificate of said trustee shall be as follows.

Form of Certificate.

This is one of the bonds aggregating five hundred thousand dollars (\$500,000), secured by the mortgage mentioned herein.

— — —, *Trustee.*

"Resolved, 2d. That in order to secure the payment of the said bonds and the interest thereon, according to the tenor thereof, there shall be executed to the trustee or trustees, selected by the Board of Directors, a deed of trust or mortgage upon The Inclined Plane Railway, street railways, properties and franchises now owned or to be thereafter acquired by this company, and that the form of said mortgage or deed of trust, together with all the conditions, stipulations and provisions thereof, shall be determined by the Board of Directors."

(Resolutions of Board of Directors.)

And said indenture further recites that

"And whereas, at a meeting of the Board of Directors of the party of the first part, duly called and held at the office thereof, on the 7th day of January, A. D., 1889, the following resolutions were passed, to-wit:

"Whereas, heretofore at a meeting of the stockholders of The Cincinnati Inclined Plane Railway Company, held on this January 7, A. D., 1889, it was resolved that an issue of five hundred thousand dollars (\$500,000) of the negotiable bonds of the said company, bearing interest at 6 per centum per annum, should be issued, and that the payment thereof should be secured by a mortgage upon The Inclined Plane Railway's properties and franchises of said company, and that the form of said mortgage, with its conditions, stipulations and provisions, should be in the form determined by the Board of Directors, and should be made to a trustee or trustees, selected by this board.

Now, therefore, Be it resolved, that in accordance with the resolution of the said stockholders, the president of this company be, and is hereby, directed to cause to be prepared and executed the negotiable bonds of this company as provided in the resolution of the said stockholders, and that he further caused to be executed a mortgage to The

Louisville Safety Vault & Trust Company, trustee, which shall be in the form, and with the conditions, stipulations and provisions contained therein, now presented to this board, and which form is ordered to be spread upon the minutes of this meeting."

That in pursuance of said resolutions of said stockholders and said Board of Directors, and in consideration of the trust thereafter stated, and the further consideration of one dollar (\$1.00)
427 cash in hand paid, the said indenture further provided, among other things, as follows:

(Mortgage.)

"That the said party of the first part does hereby bargain and sell, convey, assign and grant unto the said Louisville Safety Vault & Trust Company, party of the second part, to its successors in trust forever, all and singular The Inclined Plane Railway of the said first party, including the machinery, engines, boilers, cars, tools and fixtures connected therewith, and the real estate and right of way upon which the same are situated in the city of Cincinnati, Ohio, and also the street railway known as Route No. "Eight," in said city, heretofore conveyed to this company by a lease from Geo. A. Smith, Joseph S. Hill and James M. Doherty, dated June 19, 1877, recorded in Lease Book number fifty-seven (57), page five hundred and fifty (550) of Hamilton County, Ohio, Records; and all the street railroads owned or held by the said first party, together with the electric plant poles, wires and machinery connected therewith, and all cars and other rolling stock, tracks, easements, right of way, animals, rights, privileges and franchises of the said company, and all real and leasehold estate owned and used by the said company, and all other property, rights, privileges and franchises now owned, or which may be hereafter acquired, by said first party, and all tolls, rents, income and profits and claims and demands of every nature to be hereafter acquired by said first party. To have and to hold the same unto The Louisville Safety Vault & Trust Company, trustee, and to its successors in the trust, but in trust nevertheless for the following uses and purposes, to-wit: First, to secure the equal and pro rata payment of the principal and interest of the said bonds, according to the tenor and effect thereof, and without any priority; second, if the said principal and interest of the said bonds shall be duly paid as they shall respectively become due and payable, then this deed of trust shall be void, and the said party of the second part thereupon demand, release and discharge the lien created thereby."

And it was further provided in said indenture that

"But it is understood and agreed that until default shall have been made, as aforesaid, and until possession be taken under legal proceedings, the said party of the first part shall continue in possession of the property and manage and operate the same and receive and collect the tolls, income, profits, claims and demands, and in the regular course of business may sell and dispose of any portion or equipment

of old material, which shall become unfit or undesirable for use in the operations of the road, free from the lien of this mortgage."

428 "And it is further understood and agreed that the party of the first part herein shall deliver of the bonds hereinbefore mentioned, one hundred and twenty-five thousand dollars (\$125,000), to The Louisville Safety Vault & Trust Company, in trust to be held and exchanged at par for the issue of one hundred and twenty-five thousand dollars (\$125,000) of bonds, heretofore issued by this company, and secured by a mortgage to Henry Peachy and William A. Goodman, trustees, recorded in Book 423, page 238 of the Land Records of Hamilton county, Ohio; provided, however, that such exchange shall not be made except upon the request of the said party of the first part; and the said party of the first part shall deliver to the said Louisville Safety Vault & Trust Company one hundred and fifty thousand dollars additional of bonds of the issue herein provided for, to be held by it in trust and to be delivered by said Trust Company to the said party of the first part hereafter, when and as the same shall be required for the purpose of building and equipping any new extensions or lines of street railway, and for that purpose only, and shall be delivered only when and as the same shall be required by resolution of the Board of Directors of the party of the first part, setting forth the purpose for which they are to be used."

(Execution, Acceptance and Recording.)

Fourth. That said indenture was duly executed by signing its name thereto by the president of said Railway Company and the affixing of its corporate seal with the attestation of its secretary and duly witnessed, acknowledged and recorded on the 30th day of January, 1889, in book No. 563, page 63, Hamilton County, Ohio, Land Record. That the trust created by said indenture was not inconsistent with the laws of the Commonwealth of Kentucky, or of the state of Ohio, and was accepted in writing by indorsement on the same by said The Louisville Safety Vault & Trust Company under its corporate seal affixed thereto, attested by its secretary and the signature of its president on the 23d day of January, 1889.

(Organization, Termini, and Extension Thereof of the Railway Co.)

Fifth. The said Cincinnati Inclined Plane Railway Company, which has its principal office in the city of Cincinnati and is a citizen of the state of Ohio, was organized on the 31st of April, 1871, under the Act of May 1st, 1852, entitled "An Act to provide for the creation and regulation of incorporated companies in the state of Ohio," (1 Swan & C., 271), for the purpose of constructing a railroad, the termini of which were to be in the city of Cincinnati and the village of Avondale, in Hamilton County, Ohio; that afterwards on February 23d, 1889, the terminus of the said company's road, by a vote of its stockholders, duly certified to the secretary of said state, under the laws thereof, was extended from its then northern terminus at the Zoological Garden in Avondale, to the village of Glendale, in the same county.

428 (Railways Owned and Held by Railway Company After Executing Said Indenture.)

Sixth. That in 1871 the Railway Company constructed, upon the land held by it in fee and upon a portion of Locust street, the occupancy of which and the crossing of Miami, Baltimore and Dorsey streets so as not to obstruct the ordinary passage along said last named streets, was granted by the proper city authorities of the city of Cincinnati under the 12th section of said act of May 1, 1852. That said company since the construction of said Inclined Plane Railway has and does now maintain and operate the same. That at the time of making and delivery of the indenture and bonds as hereinbefore stated, i. e., in January, 1889, said Railway Company owned and held and was maintaining and operating under and by virtue of certain ordinances of the city of Cincinnati and the perpetual lease from Smith, Hill and Doherty hereinbefore referred to and under and by virtue of an act of the General Assembly of the state of Ohio, passed March 30, 1877 (74 Ohio L., 60), entitled, "An act relating to inclined plane railway companies organized under the Act of May, A. D. 1852, entitled, 'An Act to provide for the creation and regulation of incorporated companies in the state of Ohio,'" a street railway at the foot of the Inclined Plane Railway at the head of Main street, by a double track to Court street, thence west on Court street by a single track to Walnut street, thence south by a single track on Walnut street to Fifth street, thence east by single track on Fifth street to Main street, thence north by single track on Main street to the intersection, with its double track at Court street, and also a street railroad extending from the head of its railway by double track along Locust, Mason, Auburn and Vine street to the Zoological Garden, in Avondale, a distance of two miles.

(Grant to Use Electricity Within the City as a Propulsive Power.)

Seventh. That prior to June, 1889, the cars on the said street railways were drawn by horses or mules. That on September 24, 1885, the Board of Public Works of the city of Cincinnati, under and by virtue of the said Act of March 30, 1877, passed a resolution consenting to the use by said Railway Company either of electricity, cable or compressed air as a motive power "upon the highways in which the street railroads connected with its inclined plane, held and operated by it are laid," on condition that the said Railway Company gave bond in \$25,000, to hold the said city harmless from any damages to persons or property arising out of the use of such motive power, which bond was duly given and accepted. That on October 10, 1888, the Railway Company, reciting the resolution of September 24, 1885, made application to the Board of Public Affairs
430 of said city, the successors of the Board of Public Works, stating that it had decided to use electricity as a motive power on its road, and requested permission to erect along its lines the poles, wires and other appliances necessary to operate its road by electricity. That on October 24, 1888, the Board of Public Affairs,

under and by virtue of the said Act of March 30, 1877, and in furtherance of the grant made by the Board of Public Works, gave the Railway Company permission to erect along the entire length of its road the poles, wires and appliances necessary to operate and maintain its entire line from Fifth and Walnut streets to the Zoological Garden as an electric road, in accordance with plans and specifications of the Sprague System submitted to, and approved by the said board. That on November 23, 1888, the Railway Company entered into a contract with the Sprague Company for the construction of the Sprague System.

(Resolution of Zoological Land Syndicate.)

That in December of the same year the copper wire rail connections were made, and in the spring of 1889 the poles and wires were erected, all this work being done under the supervision of the civil engineer of the said city and of the said Board of Public Affairs, and about the beginning of June, 1889, it put its street railways in successful operation under the Sprague System as far as the Zoological Gardens. That on the 23rd day of March, 1889, the Board of County Commissioners of Hamilton county, Ohio, the public authority which owns and controlled the Carthage Turnpike, by resolution duly passed granted the said Railway Company authority to use and occupy the Carthage Turnpike with double tracks and with the necessary appendages and appurtenances of an over-head electric street railway system, and to place thereon poles and wires and run its cars thereon in the same manner and by the same system that it ran and operated them upon its existing tracks. That said resolution of March 23, 1889, was reaffirmed with certain temporary modification by a resolution of County Commissioners passed September 7, 1889. That by a resolution of the trustees of the Zoological Land Syndicate passed April 6, A. D. 1889, the said Railway Company was granted the right to construct and extend its double tracks with the necessary appendages and appurtenances of an overhead electric street railroad system, from its then northern terminus at the Zoological Garden and Erkenbrecker avenue and thence along said avenue of which said syndicate were the owners, to the Carthage Pike at or near its intersection with Ludlow avenue.

Eighth. That under and by virtue of the grant of the said
431 Zoological Land Syndicate and the resolutions of the said Board of County Commissioners of Hamilton county, and with the consent of the villages of Clifton, St. Bernard, Elmwood and Carthage, the said Railway Company, in the year A. D., 1889, constructed and extended its railway upon said Erkenbrecker avenue and said Carthage turnpike, to the county fair grounds, adjoining the said village of Carthage, a distance of five miles, and subsequently equipped the same with the Sprague Electric System and an additional power house with the machinery for generating electricity, located on the banks of Ross Run, just north of the village of St. Bernard.

(Relaying Tracks and Reconstruction of Incline.)

Ninth. That in order to comply with the requisitions of the resolutions of the Board of Public Affairs of October, 1888, and to adapt the operation of the railway by electricity as motive power, and so that the cars used thereon could be passed from Fifth and Walnut streets to the Zoological Garden without change, it became necessary to regrade and fill at great expense certain streets; to relay all of the tracks, to reconstruct the Inclined Plane Railway and the trucks run thereon; also to reconstruct the power house at the head of the Inclined Plane and put thereon new engines and boilers and the machinery necessary for generating an electric current, all of which was done in the year A. D., 1889.

(Indebtedness Created by Repaving the Streets.)

Tenth. That the defendant, the said City of Cincinnati, at the times and with the material herein stated, repaved the following streets of said city:

In the year 1886, Court street, from Main street to St. Clair alley with asphalt and the same street from St. Clair alley to Walnut street with granite.

In the year 1886, Fifth street from Walnut street to Main street, with asphalt.

In the year 1887, Walnut street, from Court street to Fifth street, and Main street from Fifth street to Court street, with asphalt.

At the time of such repaving it became necessary to, and said Railway Company did, reconstruct and relay, at great cost, expense and inconvenience, all of its tracks on all of the streets named, as aforesaid, and that such reconstruction and relaying was done with the knowledge of, and under the supervision of the defendant herein, and in part created the floating debt to be provided for by the issue of said bonds.

(Purchase of Leased Line.)

Eleventh. That by deeds duly recorded in the recorder's office of Hamilton county, Ohio, on the 11th day of October, 1889, and the 11th day of July, 1890, there was conveyed to the said
432 Railway Company, for an aggregate consideration of \$61,-
462.50, that period of the street railroad known as the Mt. Auburn Railroad leased, as hereinbefore stated, perpetually by said Smith, Hill and Doherty to said Railway Company, in pursuance of the privilege of purchase upon its part contained in said lease.

Twelfth. That all of the said \$500,000 of bonds, duly certified by your orator as trustee, authorized to be issued by said Railway Company in the form described in said mortgage indenture of January 1, 1889, and secured thereby, as stated in the third paragraph of this Bill of Complaint, except the \$125,000 thereof held in trust, by your orator for exchange for a like amount of bonds secured by a mortgage to Henry Peachy and William A. Goodman, trustees, were issued and sold at par prior to July 1, 1890, in accordance

with the provisions of said mortgage indenture, and are now outstanding and unpaid in the hands of innocent holders, who are not residents or citizens of the State of Ohio; that the proceeds arising from the sale of said bonds were duly applied by said Railway Company for the purposes provided for in the resolutions of the stockholders of the said Railway Company, as stated in the said mortgage indenture, and especially to defray the expenses incurred in reconstructing, extending and equipping with electric motive power the line of railway of said company, as stated in paragraph eight, nine and ten of this Bill.

(Issue of Preferred Stock.)

Thirteenth. And your orator is informed and believes and so states the fact to be that by virtue of proceedings duly taken under the laws of Ohio, in addition to the \$500,000 of common stock theretofore issued and outstanding, there was authorized on the 1st day of December, 1890, to be issued and there was issued and sold one hundred and fifty thousand (\$150,000) dollars of the preferred stock of the said Railway Company, the proceeds of the sales of which were to be and were used for the purpose of extending the said company's road, increasing its machinery and rolling stock, making improvements and paying its unfunded debts.

(Complaint of the Actings and Doings of the Defendant.)

Fourteenth. And your orator further complains that notwithstanding the said Railway Company constructed the said Inclined Plane Railway in the year A. D. 1871, and at the time of the making the indenture and bonds as hereinbefore stated, owned and held and was maintaining and operating the same and the street railways described in the sixth paragraph of this Bill without any question as to the right to do so being made by the state of Ohio or the said defendant, the City of Cincinnati or any other public authority, yet nevertheless the said defendant by its officers and agents is giving out and asserting in the public prints, public
433 speech and otherwise that said Railway Company has no right to hold, maintain and operate said Inclined Plane Railway and said street railways leading to and connected therewith and that the said Railway Company is a trespasser over and upon said streets mentioned in the sixth paragraph herein, and are unlawfully maintaining the necessary poles, wires and other appliances for the operation of the same by electricity as a motive power. And said defendant by its officers and agents threatens to remove said tracks with the electric appliances or to grant the right to use the same to a rival company holding and operating a parallel and competing line in said city, known as the Cincinnati Street Railway Company and to thus usurp and take away the property, rights and franchises of the said Cincinnati Inclined Plane Railway Company.

That all of said actings and doings of said defendant by its officers and agents are unlawful and contrary to equity and good conscience; that they are very hurtful to said Railway Company's

credit and business and tend greatly to depreciate its bonds in the market and destroy the security thereof, delay and stop it in the work of extending, equipping and improving its lines and thereby greatly cripple it in its service to the public as well as in its revenues and render it unable to earn sufficient to pay the interest and principle of the bonds of which your orator is trustee.

Fifteenth. That the charter of the said Railway Company and the rights and franchises acquired thereunder and under the laws of the state of Ohio constitute contract rights between the said state and city on the one part and the said Railway Company and your orator on the other and that these contract rights still exist and give the said Railway Company a perpetual right to maintain and operate its said Inclined Plane Railway and its said railway in the streets of said defendant, subject to the amending powers of the Legislature of the state of Ohio; and that the proposed action of said defendant will impair, annul and destroy the obligation of said contract rights in violation of Section 10, Article 1, of the Constitution of the United States:

And your orator will produce and prove as your Honors may direct its charter, the charter of said Railway Company, the said mortgage indenture and the laws, ordinances and other instruments in this Bill stated or referred to.

Wherefore, your orator prays that said defendant be required, but not under oath, to fully and specifically answer the premises and show, if it can, why your orator should not have the relief prayed; that your Honors will establish and protect your orator's rights in the premises against said defendant; that, pending the suit, the defendant, its officers, agents, servants and attorneys be enjoined

434 from in any way interrupting or interfering with the said Railway Company, its agents and servants in the lawful use of said streets or the lawful operation of its said lines, or from in any way interfering with, interrupting or disturbing the said Railway Company in the construction, operation and maintenance of its lines and system in the City of Cincinnati; that on final hearing said injunction be made perpetual, and that your orator may have all such further relief as may be consonant with equity and good conscience, and the nature of the case may require.

And will your Honors grant unto your orator the most gracious writ of Subpoena of the United States of America directed to the defendant, thereby commanding it personally to be and appear before your Honors and this Honorable court at a certain day and under a certain pain therein specified, and then and there to answer, all and singular, the premises and to stand to perform and abide such an order and decree therein as to your Honors shall seem meet.

THE LOUISVILLE TRUST COMPANY,

By E. A. FERGUSON, *Its Solicitor and of Counsel.*

ALEX. P. HUMPHREY,
ST. JOHN BOYLE,
Of Counsel.

(Duly verified.)

EXHIBIT 21.

Intervening Petition of W. A. Goodman, Trustee.

In the Circuit Court of the United States, for the Southern District of Ohio, Western Division.

Petition of Wm. A. Goodman, Trustee, for Leave to Intervene.

No. 4797. In Equity.

THE LOUISVILLE TRUST COMPANY, Complainant,

vs.

THE CITY OF CINCINNATI, Defendant.

To the Honorable, the Judges of the Circuit Court of the United States within and for the Southern District of Ohio, Western Division:

Comes now W. A. Goodman, trustee, as hereinafter alleged and set forth, and prays permission to intervene herein and to become a party defendant hereto, and respectfully represents that, 435 in the manner and form hereinafter alleged and set forth, the interest he represents as such trustee is material and necessary for a full, righteous, and equitable determination of all the issues involved herein; that unless he may be permitted to intervene and be heard in his own proper person or by his solicitor, the property and interest represented by him as such trustee, and being the same property upon which complainant asserts a lien and prays protection therefor, against the acts and doings of the defendant herein as alleged in its certain bill of complaint filed herein, a cloud may be cast upon his title thereto and therein; and says:

1. That he is a citizen of the state of Ohio.

2. That by indenture made and entered into on the first day of January, A. D. 1879, between The Cincinnati Inclined Plane Railway Company, of the first part, and George A. Smith, Joseph S. Hill, and James M. Doherty, of the second part, and Henry Peachey and William A. Goodman, of the city of Cincinnati, State of Ohio, Trustees, as thereafter mentioned, of the third part, it was agreed and provided that,

"Whereas, The Cincinnati Inclined Plane Railway Company is an incorporated company, organized under the laws of the state of Ohio; and whereas, at a called meeting of the Board of Directors of said Company held on the 31st day of December, 1878, at the office of said Company in the city of Cincinnati, the following resolutions were passed:

"Resolved, That for the purpose of paying the debts of the company incurred in the extension of the company's road and the increase of its equipment, one hundred and twenty-five (125) bonds of this company, of one thousand (\$1,000.00) dollars each, drawing seven per cent. (7 per cent.) interest

and running twenty (20) years from January 1, 1879, interest payable semi-annually, in July and January, at the American Exchange National Bank, in the city of New York, be issued, and a first mortgage upon the property of this company be given to Henry Peachey and William A. Goodman, as trustees, to secure the payment of said bonds and interest."

"Resolved, That the president be, and he is hereby authorized and empowered, in the name and on behalf, and as the act and deed of this corporation, to execute said bonds and this mortgage now submitted to the board, by fixing their common or corporate seal thereto respectively, to be attested by said president and by the secretary, and when acknowledged in due form, the president is hereby authorized to have said mortgage recorded and to deliver the same to Henry Peachey and William A. Goodman, trustees, as the act and deed of this corporation."

"And whereas, the said The Cincinnati Inclined Plane Railway Company, under and by virtue of the laws of Ohio, and the
436 aforesaid resolution, purpose to issue under their corporate seal one hundred and twenty-five (125) bonds, or single obligations, numbered from one (1) to one hundred and twenty-five (125) inclusive, of one thousand (\$1,000.00) dollars each, in the form following, viz:

"No. —

\$1,000.

"The Cincinnati Inclined Plane Railway Company.

"THE STATE OF OHIO,
City of Cincinnati:

"The Cincinnati Inclined Plane Railway Company, incorporated under the laws of the state of Ohio, acknowledges itself indebted to — or bearer, in the sum of one thousand dollars, to be paid on the first day of January, A. D. 1899, at the American Exchange National Bank, in the city of New York, with interest thereupon at the rate of seven per cent. per annum, to be paid semi-annually on the first days of July and January in each year at the same place, upon the presentation by the holder thereof of the proper coupon warrant hereto attached for such interest.

"To secure the payment of such principal and interest the property and income of said company has been pledged in pursuance of said laws, as evidenced by a first and only mortgage executed upon the property of said company to Henry Peachey and William A. Goodman, trustees, appointed for the purpose, bearing date —, A. D. 1879,

"In witness whereof, the said company has caused this bond to be signed by its president, countersigned by its secretary, and to be sealed with the corporate seal of the company, this first day of January, A. D. 1879.

GEO. A. SMITH,
President.

"J. M. DOHERTY,
Secretary.

"The undersigned, the trustees named in the above bonds, hereby certify that The Cincinnati Inclined Plane Railway Company, and George A. Smith, Joseph S. Hill, and James M. Doherty, have executed and delivered to them the mortgage referred to in said bond, said mortgage being for one hundred and twenty-five bonds of one thousand dollars each, and that the same has been duly recorded in Book —, page —, of the Records of Hamilton county, Ohio, and is the first and only mortgage on the property of said company.

HENRY PEACHEY,
WILLIAM A. GOODMAN,
Trustees."

"And whereas, the said George A. Smith, Joseph S. Hill, and James M. Doherty, party of the second part, by an indenture dated on the 19th day of June, A. D. 1877, recorded in Lease Book No. 57, page 550, of the said records of Hamilton county, did
437 demise and lease to said Cincinnati Inclined Plane Railway Company all and singular the street railroad owned by the said George A. Smith, Joseph S. Hill, and James M. Doherty, party of the second part hereto, known as Mount Auburn Street Railroad in Cincinnati (known also as Route No. 8), together with all tracks, rights of way, privileges and franchises, and all the real and leasehold estate connected and used therewith for stables, depots, stations, or otherwise, from the first day of July, in the year of our Lord eighteen hundred and seventy-seven for and during the term of ninety-nine (99) years, renewable thereafter forever, upon the same rents, terms, covenants, and conditions in said indenture contained, said Cincinnati Inclined Plane Railway Company yielding and paying therefore an annual rent of seven thousand one hundred and eighteen and 22-100 (\$7,118.22) dollars, payable in semi-annual installments of three thousand five hundred and fifty-nine 11-100 (\$3,559.11) dollars each, on the first days of January and July of each year, together with all taxes and assessments that shall be assessed or levied against said property.

"And whereas, said party of the second part are willing that the bonds hereby secured shall have priority and precedence of their rights as lessors.

"Now this indenture witnesseth, that as well in consideration of the premises, as for the better securing the payment of said bonds, or such of them as shall or may from time to time be issued or disposed of, with the interest which may accrue thereon, as of the sum of one dollar lawful money of the United States of America unto them in hand well and truly paid by the said Henry Peachey and William A. Goodman, trustees as aforesaid, at the time of the execution hereof, the receipt whereof is hereby acknowledged, the said The Cincinnati Inclined Plane Railway Company, and the said George A. Smith, Joseph S. Hill, and James M. Doherty, have granted, bargained, sold and conveyed, and by these presents, under and by virtue of the power and authority in them vested by the state of Ohio, and of all and every power and authority in them in any-

wise vested, do hereby grant, bargain, sell and convey to the said Henry Peachey and William A. Goodman, trustees as aforesaid, their heirs and assigns, and the heirs and assigns of the survivors of them, by way of mortgage, all and singular the railways, rails, bridges and real estate, and all the tools, income, issues and profits to accrue from the same, or any part thereof belonging to or held by said company, and all and singular the cars and rolling stock and also all and singular the franchises and property, real estate and personal, of said company, including said leased railway, together with the rights, easements, incidents and appurtenances unto and hereby granted premises belonging or in anywise appertaining.

438 "To have and to hold all and singular the hereditaments and premises hereby granted or mentioned, and intended so to be, with easements, incidents and appurtenances unto the said Henry Peachey and William A. Goodman, their heirs and assigns, and the heirs and assigns of the survivors of them, in trust, for the benefit and security of the person or persons, body or bodies, politic or corporate, who shall become the holders of said bonds, or any of them, and without priority to any holder of any such bond or bonds, subject nevertheless until default shall have occurred as hereinafter mentioned, to permit and suffer the said party of the first part hereto, their successors and assigns, and their president, directors, officers and agents to continue the use of the said premises hereby granted or mentioned or intended so to be, and said party of the first part covenanting and agreeing to keep and maintain the same in good order and repair and insured against loss or destruction by fire.

"Provided, always, nevertheless, that if the said The Cincinnati Inclined Plane Railway Company or its successors or assigns do, and shall well and truly pay, or cause to be paid unto the respective holders of said bonds, the amount of the debt or the principal sum secured by said bonds, according to the tenor or effect thereof, without any deduction for or in respect of any taxes, charges or assessments whatsoever, then this indenture and the said bonds shall cease, determine and become void, anything hereinbefore contained to the contrary notwithstanding."

That said indenture was duly executed by the said The Cincinnati Inclined Plane Railway Company, by causing it to be signed by its president, countersigned by its secretary, and to be sealed with the corporate seal of the company, and the said George A. Smith, Joseph S. Hill and James M. Doherty set their hands and seals to the same, and the same was duly witnessed, acknowledged, and recorded April 1, 1879, at three o'clock and ten minutes, in Book 423, at page 238, of the Records of Hamilton County, Ohio; that the trust created by said indenture was duly accepted by the said Henry Peachey and William A. Goodman, and the said mortgage deed and the bonds secured thereby delivered to and received by them, and the proceeds derived from the sale of said bonds applied as in said resolution and deed declared; that the lien created by the execution and delivery of said mortgage deed, as aforesaid, to the trustees aforesaid, is the first and best lien upon all and singular the property of said com-

pany, including railways, rails, bridges, real estate, and all the tools, income, issue, and profits to accrue from the same, or any part directly belonging to or held by said company, and all and singular the cars and rolling-stock, and also all and singular the franchises and property, real and personal, of said company, including all leased railways leading to or connected with its inclined plane and operated and maintained by it as necessary for the convenient dispatch of its business as an Inclined Plane Railway Company, together with all the rights, easements, incidents, and appurtenances belonging or in anywise appertaining to it, or incidental to the proper conduct of its business as an Inclined Plane Railway or otherwise; that said lien is paramount to any rights, claims, demands or charges of any other person or persons, body or bodies, politic or corporate whomsoever.

That Henry Peachey, co-trustee under said mortgage deed with your orator, departed this life on the — day of —, 18—, leaving your orator as the surviving trustee, to discharge and perform said trust according to its terms as hereinabove set forth.

Your orator avers and admits that the said The Cincinnati Inclined Plane Railway Company was organized and incorporated under the acts and at the times and for the purposes alleged in complainants' bill; that the northern terminus of said company's road as alleged therein extended to the village of Glendale, and that in accordance therewith, and under and by virtue of grants duly and lawfully made by the Board of County Commissioners of Hamilton County, Ohio, and the incorporated villages of Clifton, St. Bernard, Elmwood, and Carthage, the rails and track of said company, together with the necessary poles, wires appendages, and appurtenances pertaining to an electric street railway, have been laid and constructed by said company to the village of Hartwell, and the same have ever since been maintained and the cars of said company operated thereon by means of electricity, connecting with the inclined plane and necessary for the convenient dispatch of its business; that at the time and under the acts in the manner alleged in complainants' bill, the said company constructed and has ever since maintained and operated its inclined plane; that at the time of the execution and delivery of the indenture and the bonds secured thereby as hereinbefore stated, to-wit, January 1, 1879, the said The Cincinnati Inclined Plane Railway Company had acquired by lease and owned and held a street railway leading to and connected with the inclined plane and necessary to the convenient dispatch of its business, and was maintaining and operating the same under and by virtue of the act of the General Assembly of the state of Ohio, passed March 30, 1877 (74 Ohio Law, 66), entitled, "An act relating to Inclined Plane Railway Companies, etc.;" said street railway extending from the foot of the inclined plane at the head of Main street by a double track to Court street, thence west on Court street by a single track to Walnut street, thence south by a single track on Walnut street to Fifth street, thence east on Fifth street by a single track to Main street, thence north by a single track on Main street to the intersection with its double track

at Court street; and also maintained and operated under like conditions, a street railway extending from the head of its inclined plane by double track along Locust, Mason, Auburn, and Vine streets to the Zoological Gardens in Avondale.

That prior to June, 1889, the cars on the said street railways were drawn by horses or mules. That on September 24, 1885, the Board of Public Works of the city of Cincinnati, under and by virtue of the said act of March 30, 1877, passed a resolution consenting to the use by said railway company either of electricity, cable or compressed air as a motive power upon the highways in which the street railways connected with its inclined plane and held and operated by it are laid, on condition that the said railway company gave bond in the sum of \$25,000, to hold the said city harmless from any damages to persons or property arising out of the use of such motive power, which bond was duly given and accepted. That on October 10, 1888, the railway company, reciting the resolution of September 24, 1885, made application to the Board of Public Affairs of said city, the successors to the Board of Public Works, stating that it had decided to use electricity as a motive power on its road, and requested permission to erect along its lines the poles, wires and other appliances necessary to operate its road by electricity.

That on October 24, 1888, the Board of Public Affairs, under and by virtue of the said act of March 30, 1877, and in furtherance of a grant made by the Board of Public Works, gave the railway company permission to erect along the entire length of its road the poles, wires and appliances necessary to operate and maintain its entire line from Fifth and Walnut streets to the Zoological Garden as an electric road in accordance with plans and specifications of the Sprague system submitted to and approved by the said board. That on November 23, 1885, the railway company entered into a contract with the Sprague Company for the construction of the Sprague system.

That in December of the same year the copper wire connections were made, and in the spring of 1889 the poles and wires were erected, all of this work being done under the supervision of the civil engineer of the said city and of the said Board of Public Affairs, and about the beginning of June, 1889, it put its street railways into successful operation under the Sprague system as far as the Zoological Gardens. That on the 23d day of March, 1889, the Board of County Commissioners of Hamilton County, Ohio, the public authority which owns and controls the Carthage pike, by a resolution duly passed, granted the said railway company authority to use and
441 occupy Carthage pike with double tracks and with necessary appendages and appurtenances of an overhead electric street railroad system and to place thereon poles and wires and run its cars thereon in the same manner and by the same system that it ran and operated them upon its existing tracks.

The said resolution of March 23, 1889, was reaffirmed with certain temporary modifications by resolution of said Board of County Commissioners, passed September 7, 1889; that by a resolution of the trustees of the Zoological Land Syndicate, passed April 6, 1889, the

said railway company was granted the right to construct and extend its double tracks with the necessary appendages and appurtenances of an overhead electric street railroad system from its then northern terminus at the Zoological Garden and Erkenbrecher avenue, and thence along the said avenue of which said syndicate was the owner to the Carthage Pike at or near its intersection with Ludlow avenue.

That under and by virtue of the grant of the Zoological Land Syndicate and the resolutions of the said Board of County Commissioners of Hamilton County, and with the consent of the villages of Clifton, St. Bernard, Elmwood, and Carthage, the said railway company, in the year A. D. 1889, constructed and extended its railway upon said Erkenbrecher avenue and said Carthage pike to the county fair ground, adjoining the village of Carthage, a distance of five miles, and subsequently equipped the same with the Sprague electric system and additional power house, with the machinery for generating electricity, located on the banks of Ross Run, just north of the village of St. Bernard.

That in order to comply with the requisitions of the resolutions of the Board of Public Affairs of October, 1888, and to adapt the operation of the railway to the system of electricity as motive power, so that the cars used thereon could be passed from Fifth and Walnut to the Zoological Garden without change, it became necessary to regrade and fill, at great expense, certain streets; to relay all of the tracks; to reconstruct the inclined plane railway and the trucks thereon; also, to reconstruct the power house at the head of the inclined plane and to put therein new engines and boilers and the machinery necessary for generating an electric current; all of which was done in the year A. D. 1889.

That the defendant, the said City of Cincinnati, at the times and with the material herein stated, repaved the following streets of said city: In the year 1886, Court street, from Main street to St. Clair alley, with asphalt, and the same street, from St. Clair alley to Walnut street, with granite; in the year 1886, Fifth street, from Walnut street to Main street, with asphalt; in the year 1887, Walnut street, from Court street to Fifth street, and Main street, from

442 Fifth street to Court street, with asphalt.

At the time of such reconstruction heretofore referred to and the repaving last above mentioned, it became necessary to and said company did, not only with the full knowledge and assent, but upon the positive orders and directions of its Administrative Board of Public Works, and its successor in office, the Board of Public Affairs, and under the supervision of its chief engineer, said board being clothed under the law with the discharge of said duties, for and on behalf of the city of Cincinnati, the same being delegated to them and to them alone by the acts of the General Assembly of Ohio, said orders and directions of said board having been duly passed and made in open session of said board, reconstruct its entire inclined plane, rails, and tracks, and adapt its road to the system of electricity approved of and ordered by said Board of Public Works, and did regrade and repair the streets and portions thereof hereinbefore mentioned, as required by the orders of said board, at great inconvenience

and expense, the cost of said reconstruction of inclined plane, rails, tracks, etc., and the regrading and repairing of streets amounting to more than one-half million dollars.

That prior to the adoption, by the Board of Public Affairs, of the resolution of date October 24, 1888, which said resolution in terms ordered and directed the method and manner whereby the said company should be controlled in adapting electricity as a motive power, upon the highways in which the street railways connected with its inclined plane were laid, and before any work had been done or liability for expenditures incurred, to-wit, on August 12, 1887, Edwin Henderson, City Clerk of said city of Cincinnati, pursuant to a joint resolution of the Board of Aldermen and Councilmen of said city, theretofore passed, submitted his report to said boards upon the street railroads of said city, informing said boards, among other things:

"Mt. Auburn line (Route No. 8, etc.), from Fifth and Main; north on Main to the incline at Mulberry street; north on Locust from incline to Mason; east on Mason to Auburn avenue; north on Auburn avenue and Vine street to corporation line and Zoological Garden. Returns by double track to Main and Court; west on Court to Walnut; south on Walnut to Fifth; east on Fifth to Main.

"The right to these tracks are found in the ordinances passed August 19, 1864; September 2, 1864; October 11, 1864; May 5, 1865; September 22, 1865; August 10, 1866; September 13, 1867; and November 14, 1873; and in the ordinances entitled as follows: 'An ordinance authorizing the extension of The Cincinnati Inclined Plane Railway from the head of Main street to the Fifth Street Market Space, passed December 1, 1871, and "An ordinance" authorizing the extension of The Cincinnati Inclined Plane Railway from the inclined plane to the north corporation line at the Zoological Garden, passed October 27, 1875.'

"In the usual order of things these rights should have been renewed two and a half years ago. In this connection, however, I have the following from the Hon. E. A. Ferguson, representing the owners of this line:

"The Cincinnati Inclined Plane Railway Company was incorporated under the steam railroad law of 1852, on April 21, 1871, for the purpose of constructing a railroad from the city of Cincinnati to the village of Avondale.

"On June 16, 1871, the company was authorized by resolution of common council for the purpose of constructing its railway to occupy the streets since and now occupied by it with its inclined plane from the head of Main street to the top of the hill.

"On December 1, 1871, (Merrill's Ordinances, pages 441, 442), common council granted the right to said Cincinnati Inclined Plane Railway Company to lay double tracks from the head of Main street over the streets named in said ordinance to the Fifth Street Market Space.

"Route No. 8 had prior to that time been built, and was in operation over the streets named in ordinance establishing same (Merrill's Ordinances, page 409), and after passage of ordinance of December 1st, as above, and before any work of construction was commenced

under said ordinance, had been acquired by purchase by G. A. Smith, J. S. Hill, and J. M. Doherty, and as those gentlemen were all interested in The Cincinnati Inclined Plane Railway Company, that company only built under said ordinance that part of the road from the head of Main street to Liberty street, where it connected with Route No. 8, and the inclined plane was from then on operated in connection with Route No. 8, but the roads were owned separately and accounts so kept.

"On October 27, 1875 (Merrill's Ordinances, page 443), an ordinance was passed by common council authorizing the extension of The Cincinnati Inclined Plane Railway from the head of its inclined plane to the north corporation line at the Zoological Garden, in Avondale, over the streets named in said ordinance.

"After the construction of the road, from the foot of the inclined plane and head of Main street to Liberty street and the extension of the inclined plane from its head to the Zoological Garden, the owners of Route No. 8 abandoned the circuit up the hill, viz.: all that part of Route No. 8 running east from Main over Liberty and the streets up the hill to Auburn avenue at Mason street, at which
444 point Route No. 8 again meets inclined plane route as extended, and since then The Cincinnati Inclined Plane Railway and Route No. 8 have been operated over streets now occupied by them.

"On March 30, 1877, the General Assembly of the state of Ohio passed an act (74 Ohio L., 66), entitled, 'An Act relating to inclined plane railway companies, organized under the act of May, A. D. 1852, entitled, "An Act to provide for the creation and regulation of incorporated companies in the state of Ohio," by Section 1 of which it was provided that any inclined plane railway so organized, or that may be hereafter organized, shall have the power to hold, lease or purchase and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane; that no other motive power other than animal shall be used on highways occupied by such street railway, unless consent to such change shall be first obtained from the Board of Public Works, or other public authorities or company having charge of or owning highway on which such street railway is laid.'

"After the passage of the act of March 30, 1877, viz., on June 19, 1877, Messrs. Smith, Hill and Doherty leased to the Cincinnati Inclined Plane Railway Company all of Route No. 8, together with the tracks, rights of way, rights, privileges, and franchises, for a period of ninety-nine years, renewable forever thereafter, and with a privilege of purchase; and Route No. 8 has since been and is now being operated by said Cincinnati Inclined Plane Railway Company under the lease to it.

"On September 24, 1885, a resolution was passed by the Board of Public Works, under the authority of the act of March 30, 1877, heretofore stated, consenting to the use of either electricity, cable or compressed air as a motive power, by The Cincinnati Inclined

Plane Railway Company upon the highways in which the street railroads connected with its inclined plane and held and operated by it or laid; upon condition that a bond be executed in the sum of \$25,000.00, conditioned to hold the city harmless from any damages to persons or property arising out of the use of such motive power. The bond was duly executed and approved."

That notwithstanding the knowledge so as aforesaid conveyed to the Legislative Board of the city of Cincinnati, to-wit, the boards of aldermen and councilmen, of all matters of law and fact appertaining to the said The Cincinnati Inclined Plane Railway Company and the operation of its street railways connected with and necessary for the convenient dispatch of the business of its inclined plane upon the highways in which the same were

445 laid, and notwithstanding the knowledge on their part that the franchise originally granted to the proprietors of Route 8 of street railroads had apparently expired prior thereto, to-wit, in October, 1884, and notwithstanding the knowledge on the part of said boards that, on September 24, 1885, a resolution had been passed by the Board of Public Works, under the authority of the act of March 30, 1877, consenting on behalf of the city to use either electricity, cable, or compressed air as a motive power by the said The Cincinnati Inclined Plane Railway Company upon the highways in which the street railroads connected with its inclined plane and held and operated by it were laid, upon condition that a bond be executed in the sum of \$25,000, conditioned to hold the city harmless from any damages to persons or property arising out of the use of such motive power, and which bond the said boards were advised had been executed, received, approved, and accepted by said city; yet, nevertheless, said boards of aldermen and councilmen, neither protesting nor objecting to the action aforesaid of said Board of Public Works, but, on the contrary, ratified and approved the same by the adoption of said report so made to them as aforesaid by said city clerk.

And your orator further says that without notice or protest from said, the legislative boards of said city, who alone are invested, under the laws of the state of Ohio, with the power to make or renew grants to persons or corporations to construct and operate street railroads within the limits of said city, the said company did, in the year 1889, induced thereto by the acquiescence in and approval of said common council in the action, resolutions, orders and directions of said Board of Public Affairs of said city, reconstruct its plant and other works, and regrade and repave the streets occupied by its tracks in the manner hereinbefore described, and thereby expended the large sums of money hereinbefore set forth, and that to meet said expenditures so as aforesaid rendered necessary by the acts of said city, the said company executed and delivered its other certain mortgage deed of date January 1, 1889, to secure the payment of its certain mortgage bonds, aggregating \$500,000, as more fully set forth in complainants' bill filed herein, and caused to be issued \$150,000 of the preferred stock of said company, the proceeds arising from the sale of which were used to meet the expenditures so aforesaid mentioned.

And your orator further complains that, notwithstanding the said railway company constructed the said inclined plane railway in the year 1871, and at the time of the making the indenture and bonds, as hereinbefore stated, owned and held and was maintaining and

operating the same, and the street railways described in the
 446 sixth paragraph of complainant's bill, without any question as to the right to do so being made by the State of Ohio, or the City of Cincinnati, or any public authority; yet, nevertheless, the said defendant, by its officers and agents, is giving out and asserting in the public prints, public speech, and otherwise, that said railway has no right to hold, maintain and operate said inclined plane railway and said railways leading to and connecting therewith; and that said railway company is a trespasser over and upon said streets mentioned in the sixth paragraph of complainant's bill, and it is unlawfully maintaining the necessary poles, wires, and other appliances for the operation of the same by electricity as a motive power.

And said defendant, by its officers and agents, threatens to remove said tracks, with the electric appliances, or to grant the right to use the same to a rival company holding and operating a parallel and competing line in said City, known as Cincinnati Street Railway Company, and to thus usurp and take away the property, rights, and franchises of said The Cincinnati Inclined Plane Railway Company.

That all of said actings and doings of said defendant by its officers and agents are unlawful and contrary to equity and good conscience; that they are very hurtful to said railway company's credit and business, and tend greatly to depreciate its bonds in the market and destroy the security thereof, delay and stop it in the work of extending, equipping and improving its lines, and thereby greatly cripple it in its service of the public, as well as in its revenues, and render it unable to earn sufficient to pay the interest and principal of the bonds of which your orator is Trustee.

That the character of said Railway Company and the rights and franchises acquired thereunder, and under the laws of the State of Ohio, constitute contract rights between the said State and City on the one part and the said railway company and your orator on the other, and that these contract rights still exist and give the said railway Company a perpetual right to maintain and operate its said inclined plane railway, and its lines of railway in the streets of said defendant subject to the amending powers of the legislature of the State of Ohio; and that the proposed action of said defendant will impair, annul, and destroy the obligation of said contract rights, in violation of section 10, article 1, of the Constitution of the United States; and your orators will produce and prove, as your Honors may direct, its charter, the charter of said railway company, the said mortgage indenture, and the laws, ordinances, and other instruments in this bill stated or referred to.

Wherefore, your orator prays that he may be permitted to intervene in this case, and may have leave to file this his petition
 447 in that behalf herein; that your Honors will establish and protect your orator's rights in the premises; that pending

the suit, the defendant, its officers, agents, servants, and attorneys be enjoined from in any way interrupting or interfering with the said railway company, its agents and servants in the lawful use of said streets, or the lawful operation of its said lines, or from in any way interfering with, interrupting, or disturbing the said railway company in the construction, operation, and maintenance of its lines and system in the City of Cincinnati; that an final hearing said injunction be made perpetual, and that your orator may have all such further relief as may be consonant with equity and good conscience, and the nature of the case may require.

WILLIAM A. GOODMAN, *Trustee*,
By OUTCALT, GRANGER & HUNT,
His Solicitors and Counsel.

(Duly verified.)

EXHIBIT 22.

The Answer of the City of Cincinnati.

In the Circuit Court of the United States for the Southern District of Ohio, Western Division.

No. 4797. In Equity.

THE LOUISVILLE TRUST COMPANY, Complainant.

vs.

THE CITY OF CINCINNATI, Defendant.

The Answer of the City of Cincinnati, Defendant, to the Bill of Complaint of The Louisville Trust Company, Complainant.

This defendant now and at all times hereafter, saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto, or to so much thereof as this defendant is advised is material or necessary for it to answer to, answering says:

This defendant admits that it is a municipal corporation, existing under the laws of the state of Ohio, and that it is a city of the first grade and of the first class.

This defendant denies that the relaying and reconstruction of the tracks of the said Inclined Plane Railway Company on the streets named in the tenth paragraph of the Bill of Complaint, was
448 done with the knowledge and under the supervision of this defendant, and this defendant does not know, and can not set forth as to its belief whether or not the said relaying and reconstruction of said tracks in part created the floating debt to be provided for by the issue of said bonds, as averred in said tenth paragraph of the Bill of Complaint.

This defendant further says that it does not know and can not set forth as to its belief whether or not it is the fact, as alleged

in the twelfth paragraph of the Bill of Complaint, that all of the said \$500,000 of bonds were issued and sold prior to July 1, 1890, and are now outstanding and unpaid in the hands of innocent holders, or that the proceeds of said bonds were applied to defray the expenses incurred in reconstruction, extending and equipping with electric motive power the line of railway of said company, as averred in said twelfth paragraph of the Bill of Complaint.

The defendant does not know and can not set forth as to its belief, whether or not it is the fact there was issued and sold \$150,000 of the preferred stock of said company, or that the proceeds of the sale thereof were to be and were used for the purpose of extending the said company's road, in increasing its machinery and rolling stock, making improvements and paying its unfunded debts, as averred in the thirteenth paragraph of the Bill of Complaint.

This defendant denies each and every averment in the fifteenth paragraph of the Bill of Complaint contained.

This defendant says that it had no knowledge or notice of the making of the mortgage described in the Bill of Complaint to the complainant, or of the issue or sale of any bonds secured by said mortgage, until long after the execution of said mortgage.

This defendant, further answering, says that by its proper boards and officers, on the first day of July, 1859, it passed an ordinance entitled, "An ordinance prescribing the terms and conditions of street passenger railroads within the city of Cincinnati." (Coppock & Hertenstein, 517.) That by Section 4 of said ordinance it was made the duty of any company or individuals to whom any privileges thereunder should be granted, to keep the streets occupied by their tracks in repair, and on failing to do so, the city council should have the right to prevent the use of said streets by removing the rails therefrom. That by Section 15 of said ordinance it was provided that: All contracts for the construction and operation of street railroads, under its provisions, should be for the term and period of twenty years.

This defendant says that by its proper boards and officers on November 6, 1863, it passed an ordinance amending Section 4 of said ordinance of July, 1869, and releasing the several street railroads companies, having roads then in operation, from the obligations to boulder the unbouldered streets.

That on October 20, 1865, this defendant, by its proper boards and officers, passed an ordinance entitled, "An ordinance supplementary to and amendatory of an ordinance prescribing the terms and conditions of street passenger railroads within the city of Cincinnati, passed July 1, 1859, and repealing the fourth section thereof." (Coppock & Hertenstein, 521.)

That by the terms of said ordinance it was provided that all the street passenger railroad companies, to which the right to construct and operate any street passenger route has been granted by the city, whether heretofore constructed or to be constructed under grants heretofore made, shall, upon agreeing respectively, to pay annually one hundred dollars a car license for each and every car run upon the respective roads, for the year for which license shall

be granted, be released from all obligation to repair streets or gutters, and the city shall assume entire control thereof and responsibility therefor."

That by its proper boards and officers this defendant, on the 7th day of February, 1879, passed an ordinance entitled, "An ordinance providing for the construction, operation and government of street railroads." (Coppock & Hertenstein, 528.)

That by Section 14 of said ordinance it was provided that the right to operate any road constructed under its provisions, or coming thereunder, by filing a written acceptance and bond, as therein provided, should continue for a period of twenty years, only from the date of any such grant or acceptance."

II. That this defendant, by its proper boards and officers on August 19, 1864, passed an ordinance entitled, "An ordinance fixing Route No. 8 for street passenger railroads and requiring the Board of City Improvements to advertise for bids for the same." (Coppock & Hertenstein, 568.)

That by the terms of said ordinance it provided that Route No. 8, for street passenger railroads in Cincinnati, should be as follows:

Commencing at the corner of Main and Fifth streets; thence on Main to Orchard street, crossing the canal bridge on the eastern roadway; thence on Orchard street to Sycamore street; thence on Sycamore to Liberty street; thence to Auburn street, on such streets or parts of streets as the contractor or contractors for building and operating said railroad shall select; thence on Auburn street to the north corporation line of the city, returning by the same track, with suitable turnouts, to the corner of Sycamore and Orchard streets; thence on Sycamore to Franklin street; thence on Franklin to Main street; thence on Main to Court street, crossing the canal bridge on the western roadway; thence on Court to Walnut street; thence on Walnut to Fifth street, occupying the track of The Cincinnati Street Railway Company, from Ninth to Fifth streets, according to the provisions of Section 13 of an ordinance prescribing the terms and conditions of street railroads within the city of Cincinnati, passed July 1, 1859, and to the contract of said last named company with the city; thence on Fifth street to the place of beginning, occupying the track of the Passenger Railroad Company of Cincinnati, in common with said last named company, according to the provisions of said Section 13 of said ordinance, and the contract of said last named company with the city; and it was further provided in said ordinance of August 19, 1864, that the person or company to whom this route shall be awarded shall be subject to the provisions of the general ordinance prescribing the terms and conditions of street railroads in the city of Cincinnati, passed July 1, 1859, except that such person or company shall not be required to purchase any omnibus line or stock, and that Section 8 of said general ordinance shall not be held to apply to this route, nor shall the person or company to whom this route shall be awarded fail to comply with the terms and conditions of this section; the mayor shall have

the free power to cause the stoppage of running of the cars upon the said railroad until said terms and conditions are complied with.

That on October 11, 1864, defendant, by its proper boards and officers, passed an ordinance entitled, "An ordinance supplementary to an ordinance fixing Route 8," etc. (Coppock & Hertenstein, 571.) By the terms of which it was provided that the grant to operate Route No. 8 be awarded to Porteus B. Roberts, he having, after due advertisement and proposals invited therefor, agreed to carry passengers at lower rates of fare than any other bidder.

That on May 5, 1865, this defendant, by its proper boards and officers, passed an ordinance entitled, "An ordinance supplementary to an ordinance fixing Route 8," etc. (Coppock & Hertenstein, 572) giving the contractor of said Route No. 8 authority to construct, lay and use a double track on that part of Main street between Fifth and Liberty streets.

That on September 22, 1865, this defendant, by its proper boards and officers, passed an ordinance entitled, "An ordinance to amend an ordinance fixing Route No. 8," etc. (Coppock & Hertenstein, 573), by the terms of which it was provided that Price street between Liberty and Ringgold streets and Ringgold street between Price and Josephine streets; Josephine street between Ringgold and Saunders street; Saunders street between Josephine and Auburn streets; Young street between Ringgold and Slack streets; Slack street between Young and Price streets,— and the same is hereby made a part of Route No. 8. The contractor of said route having selected the said streets for the same route, between Liberty and Auburn streets, and having exhibited to city council evidence
451 of the consent of the majority in interest of the property-owners on each of the streets above described.

That on August 10, 1886, this defendant, by its proper boards and officers, passed an ordinance entitled, "An ordinance supplementary to an ordinance fixing Route No. 8," etc. (Coppock & Hertenstein, 574), giving the proprietors of said Route No. 8 the right to lay a single track on Main street above Orchard street; thence from Main on Liberty street, to Sycamore and a double track on Liberty street above Pendleton street, and on Price, Ringgold, Josephine, Saunders and Auburn streets to the north corporation line of the city.

That on September 13, 1867, this defendant, by its proper boards and officers passed an ordinance entitled, "An ordinance granting the right to the Mt. Auburn R. R. Co. of extending its track on Main street north to Liberty street, 150 feet. (Coppock & Hertenstein, 575.)

That on November 14, 1873, this defendant, by its proper boards and officers, passed an ordinance entitled, "An ordinance authorizing the proprietors of Route No. 8 street railroad to lay an additional track on Main street, from Liberty street to Court street." (Coppock & Hertenstein, 576.) That by the terms of said ordinance it was provided that the grant should be subject to the terms, rights and conditions of the present contract between the city and the said proprietors of said Route No. 8, and shall expire at the

time that the right of way originally granted said route, and under which it now operates, expires.

Defendant says that in pursuance of the ordinance passed October 11, 1864, awarding to said Roberts the right to construct Route No. 8, etc., a commission, consisting of the city auditor, city solicitor and president of the city council met for the purpose of awarding said contract to said Roberts, at the office of the city solicitor, October 26, 1864, and by resolution adopted on that date, said contract was formally awarded to said Roberts. That in pursuance of said ordinance passed October 11, 1864, and said resolution passed October 26, 1864, awarding said contract to said Roberts, the proper authorities of this said defendant, on the 29th day of October, 1864, granted to said P. B. Roberts permission to construct and operate said street railroad on said Route No. (8) for the term and period of twenty years only, and subject to all the provisions and requirements and conditions of the said ordinance of August 19, 1864, fixing said Route eight, and of the said general ordinance, passed July 1, 1859, and hereinbefore referred to.

That on August 18, 1865, this defendant, by its proper boards and officers, passed a resolution authorizing P. B. Roberts to transfer all his rights and interests in said Route No. 8 to the Mt. Auburn Street Railroad Company.

452 This defendant says that on April 13, 1868, the board of directors of the Mt. Auburn Street R. R. Co. passed a resolution authorizing the acceptance of the provisions of Section 2 of the ordinance passed October 20, 1865, relieving street passenger railroads from the obligation to repair streets, upon their agreeing respectively to pay a license fee of one hundred dollars annually for each car run upon their roads.

That on April 30, 1868, said company, by its proper boards and officers, formally accepted the modification of said contract with this defendant, in accordance with the said resolution.

This defendant says that it admits that said Route No. 8 was subsequently leased and thereafter conveyed to The Cincinnati Inclined Plane Railway Company, but defendant says that if said company thereby acquired any right to maintain, hold and operate said Route No. 8, said right was acquired, subject to the terms and conditions of the original grant to Porteus B. Roberts, with only such modifications as were made therein by the ordinance hereinbefore referred to; and that the grant to operate Route No. 8, by its terms, expired in 1884.

This defendant says that neither The Cincinnati Inclined Plane Railway Company, nor any other person or company, has any right to operate the said route or to occupy the streets of this defendant with the tracks of said Route No. 8.

IV. This defendant says that it admits that the General Assembly of the state of Ohio, of March 30, 1877, passed an act relating to inclined plane railway companies, organized under the Act of May, 1852, entitled, "An Act to provide for the creation and regulation of incorporated companies in the state of Ohio;" but defend-

ant alleges that said act is unconstitutional and void, as being in conflict with Article 13, Section 1 of the Constitution of the state of Ohio. Defendant says that The Cincinnati Inclined Plane Railway Company acquired under said act no right to lease, purchase or operate any street railway or lines of street railway in the streets of the defendant.

V. This defendant says that the resolution of the board of aldermen and of the common council of said city, of 1871, which granted permission to the said Cincinnati Inclined Plane Railway Company to cross Miami, Baltimore and Dorsey streets and to occupy part of Guilford or Locust street, by its terms, limited the grant to twenty years from the date of its passage; that said grant has expired, and that therefore said company has no right to maintain and operate its tracks on or over such streets, nor to occupy any part of such streets; that said company occupies a part of Guilford or Locust street, between Dorsey and Saunders streets, in such a manner as to totally deprive the public of the use of part of said streets, so occupied; and said company has no right to occupy said portion of said streets under the said resolution.

453 Defendant says that part of the street railway route operated by said Cincinnati Inclined Plane Railway Company, viz., between Mulberry street and Liberty street, is operated under a pretended grant made by the common council of the city of Cincinnati to The Cincinnati Inclined Plane Railway Company under an ordinance passed December 1, 1871 (*Coppock & Hertenstein*, 664), and that said grant and said ordinance are illegal and void, for the reason that said grant was made without competition and due advertisement and letting to the lowest bidder, as required by law, and that said portion of said route is not an extension of any street railway.

Defendant says that part of the route operated by The Cincinnati Inclined Plane Railway Company, extending by double track from the inclined plane on Locust street, thence north to Mason street; on Mason to Auburn street, and on Auburn street with a single track from Mason street northwardly to Vine street, and by double track to the corporation line of *tober 27, 1875* (*Coppock & Hertenstein*, 666). That said grant made under an ordinance of the city of Cincinnati, passed October 27, 1875, (*Coppock v. Hertenstein*, 666). That said grant and said ordinance are illegal and void, for the reason that said grant was made without competition, due advertisement and letting to the lowest bidder, as required by law, and because said grant is not an extension of any street railway.

VI. This defendant says that The Cincinnati Inclined Plane Railway Company acquired no right to operate the street railways operated by it, or to operate an inclined plane railway by the resolutions referred to in the Bill of Complaint, passed by the Board of Public Works September 24, 1885, and Board of Public Affairs October 24, 1888, because the common council of the city of Cincinnati did not concur in the said resolutions, and the same were not approved and signed by the mayor of said city, and for the

further reason that the said resolutions did not purport to and could not make a grant of the right to operate any railway or a grant extending or renewing any of the rights of The Inclined Plane Railway Company to operate any street railway route the grant for which had heretofore expired. And this defendant says that said resolutions were passed by said boards upon the application and at the request of said Cincinnati Inclined Plane Railway Company.

And this defendant will produce and prove the laws, ordinances and other instruments in this answer stated or referred to.

VII. This defendant says that on the 12th of December, 1890, it brought an action in the Superior Court of Cincinnati, a court of competent jurisdiction and having jurisdiction of the parties in case No. 45202 on the docket of said court, against The Cincinnati

Inclined Plane Railway Company, to recover certain license
454 fees alleged to be due from said company to this defendant, and praying that said company be enjoined from maintaining and operating its cars upon more than one track on Auburn street, between Mason and Vine streets, and be enjoined from maintaining its tracks or operating its cars upon any of the tracks on Main street, Court, Walnut or Fifth streets, and for such other relief as in equity plaintiff may be entitled to.

That thereafter, to-wit, on the 10th of January, 1891, the said company *pled* its answer in said court, and on December 5, 1891, its supplementary answer, and on May 3, 1892, the cause having been heard at the special term of said court, and having been reserved for hearing by the general term of said court. On October 21, 1893, a final decree was rendered by said general term of said court, and judgment entered therein, whereby it was adjudged and decreed that the defendant, The Cincinnati Inclined Plane Railway Company, be and the same was hereby perpetually enjoined from maintaining any of its said tracks, poles, wires or other appliances in Main street, Court street, Walnut street or Fifth street, and from operating any of its cars over any of the said tracks, and was perpetually enjoined from maintaining and operating more than one street railway track on Auburn street, between Mason and Vine streets; and finding, further, that the defendant, The Cincinnati Inclined Plane Railway Company, was indebted to the plaintiff for license fees of one dollar per annum for each car operated over any of the tracks of street railroad Route No. 8, as described in the plaintiff's petition, between the years 1877 to 1884, inclusive, reserving for future ascertainment by master the liability of the plaintiff for unpaid license fees of one dollar per annum for each car operated.

That thereafter, to-wit, on the 23d day of October, 1894, a judgment was rendered in the Supreme Court of the state of Ohio, affirming this judgment and decree of the Superior Court in general term.

And on the — day of October, 1894, a mandate was sent to said Superior Court in general term to carry into effect the said decree.

This defendant, further answering, says that under and by vir-

tue of said judgment and decree, as well as for the other reasons hereinbefore stated, this defendant claims to have and has the right to remove the tracks, poles, wires and other appliances maintained by the said Cincinnati Inclined Plane Railway Company in Main street, Court street, Walnut and Fifth streets, and to prevent said railway company from operating any of its cars over said tracks, and also the right to remove one of said railway company's tracks from Auburn street, between Mason and Vine streets, and to prevent said company from operating its cars on more than one track on said Auburn street, between Mason and Vine
455 streets, and that the use and occupancy by said The Cincinnati Inclined Plane Railway Company with its tracks and the operation of its railway on the streets named in said judgment, is in violation of the injunction granted by said court, and said railway company has been and now is in contempt of said court for disobedience of the order.

And this defendant, further answering, says that it has the right to prevent said Railway Company from holding, maintaining and operating said inclined plane across, over or upon the streets mentioned in said resolution of June 16, 1871, because the right to do so was never lawfully acquired by said company, and has, moreover, by its terms, expired. And that this defendant has the right to prevent said railway company from maintaining and operating said double tracks between Mulberry and Liberty streets, and said double tracks on Locust street and Mason street; also its tracks on Vine Street, to the corporation line of the city and Avondale, because said Inclined Plane Railway Company never lawfully acquired the right to maintain and operate said tracks, or any of them, for the reasons hereinbefore stated; and his defendant says that any and all orders by it made to require said Inclined Plane Railway Company to remove its tracks, with the electrical appliances, from the streets aforesaid, are lawful and within the rights of this defendant, for the reason that said Inclined Plane Railway Company has, as hereinbefore set forth, no right whatever to use or occupy any part of the streets of this defendant for any purpose, and is a trespasser therein.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged without this, that there is any other matter, cause or thing in the said plaintiff's said Bill of Complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

FRED. HERTENSTEIN,

Corporation Counsel of the City of Cincinnati.

J. D. BRANNAN, *Of Counsel.*

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EXHIBIT 23.

Answer of City of Cincinnati to Intervening Petition of W. A. Goodman, Trustee.

Circuit Court of the United States, Southern District of Ohio,
Western Division.

No. 4797. In Equity.

THE LOUISVILLE TRUST COMPANY, Complainant,

vs.

THE CITY OF CINCINNATI, Defendant.

Answer of the City of Cincinnati to the Intervening Petition of
William A. Goodman, Trustee.

Now comes the defendant, the City of Cincinnati, and answering the intervening petition of William A. Goodman, trustee, says that it adopts and reaffirms each and every allegation of its answer to the Bill of Complaint and prays that the same be taken as an answer to said intervening petition to the same extent and as fully as if the same were herein repeated in full.

And further answering, this defendant says that it denies that said Edwin Henderson, city clerk of said city, submitted the report referred to in said intervening petition to the board of aldermen and councilmen of said city, as in said intervening petition alleged, and denies that said board of aldermen and councilmen ratified and approved the action of the said Board of Public Works of said city in adopting the said resolution of September 24, 1885, and denies that said boards of aldermen and councilmen adopted said report of said city clerk.

And this defendant, further answering, says that it denies that the said Cincinnati Inclined Plane Railway Company, in reconstructing its plant and other works and in regrading and repaving the streets occupied by its tracks and in expending the moneys stated in said intervening petition was thereto induced by the acquiescence in and approval of the common council of said city, in the action and resolutions, orders and directions of the Board of Public Affairs of said city, and this defendant avers that neither said city nor its common council ever in fact acquiesced in or approved of said action, resolution, orders and directions of said Board of Public Affairs.

All which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays that said intervening petition may be dismissed.

FRED HERTENSTEIN,

Corporation Counsel and Attorney for Defendant.

J. D. BRANNAN, *Of Counsel.*

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EXHIBIT 24.

Exhibit 8-X—Entry of Consolidation.

No. 4797.

LOUISVILLE TRUST CO.

vs.

THE CITY OF CINCINNATI.

No. 4859.

LOUISVILLE TRUST CO.

vs.

THE CIN'TI INC. PLANE CO.

And now comes complainant in said above entitled causes and on its motion it is now ordered that these causes be consolidated, and that they shall hereafter proceed as one cause under the style of the second named cause as above.

Entered December 19, 1896, Journal 3, page 458, U. S. Circuit Court, Southern District, Ohio, Western Division.

* * * * *

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Stipulation.

(Filed May 31, 1904.)

Counsel for defendants in error having offered in evidence the printed record in case No. 6737 of the Supreme Court of Ohio, Village of Carthage v. The Millcreek Valley Street Railway Company, and the same having been numbered Exhibit 26 in this cause, and Exhibits numbers 19, 24 and 25 offered in this cause being contained in said printed record as follows; Exhibit 19 at page 51; 466-478 Exhibit 24 at page 63, and Exhibit 25 at page 76, it is now agreed that in printing the record in this cause the plaintiff in error shall print only the following portions of said Exhibit No. 26; that is to say, said Exhibits 19, 24 and 25, and the original petition, filed August 14, 1898, in Hamilton Common Pleas, No. 114342; the supplemental petition, filed August 12, 1898; the answer, filed August 16, 1898; the amendment to petition, filed October 31, 1898; the answer to the amendment to petition, filed November 7, 1898; the amendment to answer, filed December 8, 1898; the reply to answer and cross-petition of the Village of Carthage, filed February 10, 1898; and the judgment entry in the Circuit Court of Hamilton County, before which court said cause was heard upon appeal; said judgment having been entered on July 1, 1899, Minutes 261.

Either party may in argument refer to any other portions of the record in said cause No. 6737, and may print in his brief any fur-

ther portions thereof which he may deem material to the consideration of the case.

May 25, 1904.

E. W. KITTREDGE AND
J. W. WARRINGTON,

Counsel for Defendant in Error.

SAMUEL W. BELL,
JOHN R. SAYLER,
WM. WORTHINGTON, AND
SAMUEL B. HAMMEL,

Counsel for Plaintiffs in Error.

* * * * *

479 To the Honorable Board of County Commissioners of Hamilton County, Ohio.

GENTLEMEN: On the 19th day of March, A. D. 1895, The Hamilton, Springfield and Carthage Turnpike Company entered into a written contract with the Cincinnati, Hamilton, Middletown & Dayton Street Railway Company, for the consideration in said contract expressed, for a right of way for the latter Company's street railroad over said turnpike its entire length according to the terms and conditions in said contract set forth, a copy of said contract with the authority to execute same is hereto attached.

The written consents of the owners of a majority of the feet front of the lands and lots abutting on said turnpike have also been procured by said grantee—so that said grant is now a valid and subsisting grant which said grantor had the legal right and power to make under section 3141 of the Revised Statutes of Ohio. (See in support thereof Cincinnati vs. Columbia and Cincinnati Street Railway 17 Bulletin, 192; also Street Railroad Company vs. Cummins-ville 14 O. S. R. page 523.)

The Cincinnati, Hamilton, Middletown & Dayton Street Railway Company therefore, respectfully asks that in any grant made by your board to the Village of Carthage or otherwise, of jurisdiction or control over any portion of said turnpike or highway either within or without said village, that it be made subject to all the rights of said Street Railroad Company under the grant from said turnpike Company.

Respectfully submitted,

A. HICKENLOOPER,
Vice-President C. H. M. & D. St. Ry. Co.

480 At a meeting of the Board of Directors of the Hamilton, Springfield and Carthage Turnpike Company held this nineteenth day of March A. D., eighteen hundred and ninety-five (1895) at Springfield, Ohio, pursuant to call of the president, all the Directors being present, to-wit: March C. McMacken, Ira R. Edwards, David Huston, John L. Riddle, John L. Huston and Samuel F. Hunt, the following action was taken:

Resolved, That the Board of Directors of the Hamilton, Springfield and Carthage Turnpike Company duly authorize and direct

the present Board to sign, seal and deliver to the duly authorized agent or officer of the Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company a grant of the right of way over the turnpike of the Hamilton, Springfield and Carthage Turnpike Company from its southern terminus of said turnpike at Carthage, Ohio, to the northern terminus of said turnpike at the southern boundary of the corporation line of Hamilton, Ohio, a copy of which grant is hereto attached and made a part of the original minutes.

Resolved II, That the Secretary of this Company be and he is hereby authorized and directed to furnish a certified copy of the resolution to accompany the contract when transmitted for official concurrent action of the Board of Directors of the Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company.

Aye—McMacken, Edwards, Huston, Riddle, Huston, Hunt.

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Contract.

The Hamilton, Springfield and Carthage Turnpike Company, and the Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company.

This Agreement entered into this 19th day of March, 1895, by and between the Hamilton, Springfield and Carthage Turnpike Company, a corporation under the laws of Ohio, party of the first part, and the Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company, a corporation under the laws of Ohio, party of the second part.

Witnesseth: The party of the first part in consideration of the terms and conditions hereinafter specified, does hereby grant to the party of the second part, its successors and assigns, the perpetual and exclusive right of way over said turnpike in so far as the part of the first — has power to convey the same, subject however, to all the present uses for turnpike purposes by the party of the first part from its southernly terminus at Carthage, Ohio, to its northernly terminus at Hamilton, Ohio, for the purpose of constructing, maintaining and operating thereon a street railroad to be operated by electricity or other motive power except steam.

As a general rule, said perpetual right of way shall be on and over strips 12 1-6 inches in width lying and being 15 feet on each side of the center line of said pike, but where but one side is occupied the party of the second part shall have the right to lay all necessary switches or turnouts, provided the inner rail of said switch or turnout is not laid less than 10 feet from the center line of said pike, and when for any reason it becomes necessary or advisable to lay tracks from one side to the other the said party of the second part may have the right so to do provided said crossing is so planked, paved and kept in repair as not to obstruct or impede vehicular travel thereon, and whenever it may become necessary to leave said roadway for the purpose of entering stations, storage sheds, or loading places; or for the purpose of connecting with branch lines it shall have the right so to do.

And where it is deemed necessary by the party of the second part that trackways shall be laid in and along the center of the roadway, the consent of the party of the first part shall first be had and obtained for the laying of said trackways, and so long as said road shall be used and maintained as a toll turnpike by the party of the first part, the party of the second part shall at its own cost and expense grade, gravel and keep in repair any traveled roadway where the tracks are so laid to the full width of 18 feet on both sides of the center line of said turnpike, and in case it fails so to do, the party of the first part, upon and after ten days' previous written notice, may do so at the cost and expense of the party of the second part, nor shall the trackways be so laid or maintained as to impede the drainage of said turnpike.

That where said street railroad passes any toll gate the tracks shall be laid outside the limits of the gate, or the location of the gates be so changed at the expense of the party of the second part as the party of the first part may direct; and that where the said street railroad passes under the C. H. & D. R. R. the party of the second part shall pave and keep in repair the entire roadway in such manner as the party of the first part may direct.

That all carrying poles shall be placed by the party of the second part as not to unnecessarily interfere with vehicular travel; all private and public roadway entrances and crossings shall be graded and graveled by the party of the second part to the satisfaction of the parties interested therein; and all grades established for said tracks shall be as near as may be practicable with the requirements of rapid transit, be made to compare in a general way with the existing grades on said roadway.

It is further agreed and understood that the party of the second part shall commence the construction of said line of street railroad within a period of three years from the date of this contract, and complete the same within a period of two years after commencing said construction; unless such delay is occasioned by obstructions on the line of right of way, the removal of which may be contested; the procurement of injunctions, or other legal interference; inability to acquire the necessary consents from abutting property owners, or necessary franchise privileges from municipalities through which the road is to run, otherwise this grant shall cease and determine, and if after said road commences using its cars, it shall cease to be operated as a street railroad for the carrying of passengers for a period of nine months this grant shall cease and determine.

That it is further agreed and understood that the party of the first part shall not be liable for any damages either to the abutting property owners, or to damage resulting from the construction or operation of said street railroad; nor for any expenses or damages

incident to removal of telegraph or telephone poles, fences or any other obstruction along said roadway necessary to its enjoyment of said right of way; but the party of the second part may institute and procure all legal or other proper proceedings in the name and by the authority of the party of the first part necessary to secure, hold and enjoy the right of way herein granted;

provided that the party of the second part shall pay all of the charges and expenses of any and all such proceedings.

That the grant is given subject to the consent in writing of a majority in feet front of the lot and land owners along the route herein before described, and the further understanding that the parties to whom this grant is hereby conveyed shall not hold, dispose of, or transfer the same as their personal property, but that it shall be considered the corporate property of the party of the second part for the purpose of the construction and operation of this proposed road to which the party of the second part hereby pledges itself.

That for and in consideration of said exclusive perpetual right of way the said party of the second part shall pay to the party of the first part the sum of fifteen thousand (\$15,000) dollars, one-half in cash upon the signing, sealing and delivery of this contract, and the other half whenever the party of the second part proceeds to enter upon and occupy said right of way herein before described.

In witness whereof the parties hereto by the President of each corporation duly authorized by the Board of Directors of said corporations have hereunto and unto a duplicate thereof, set their names and attached their corporation seals the day and year before stated.

[SEAL.] THE CINCINNATI, HAMILTON, MIDDLE-
TOWN AND DAYTON STREET RAIL-
ROAD COMPANY.

By A. HICKENLOOPER, *Vice-President*.

[SEAL.] THE HAMILTON, SPRINGFIELD AND
CARTHAGE TURNPIKE COMPANY.

By JOHN L. HUSTON, *President*.

I hereby certify that the foregoing is a true copy of the original record in the above matter as that the accompanying contract was signed in my presence by the President of the Board of Directors of the Hamilton, Springfield and Carthage Turnpike Company and authority of the Board in regular meeting, and to which every member voted aye.

JOHN L. RIDDLE, [SEAL.]
Secretary.

[SEAL.] JOHN L. HUSTON,
President.

Comp. Ex. No. 9.

484 Proceedings of Hamilton County Commissioners, March 14, 1900, and October 6, 1900, granting to the Millcreek Valley Street Railroad Company, franchise over the Hamilton, Springfield and Carthage Turnpike from its Southern Terminus in Carthage to the North Boundary Line of Hamilton County.

Volume 30, Pages 361, 362 and 363. March 14, 1900.

Proceedings Before the Board of County Commissioners of Hamilton County, Ohio.

Whereas, application has this day been filed by The Millcreek Valley Street Railroad Company, successor to the Cincinnati, Hamilton, Middletown and Dayton Street Railroad Company, for the right to construct and operate its said railroad by motive power other than steam, over the turnpike known as the Hamilton, Springfield and Carthage Turnpike, and

Whereas, the said Millcreek Valley Street Railroad Company, has filed with the clerk of this Board, the consents of the majority of the feet front of the owners of the abutting property along said turnpike, and whereas there will be great benefit to the County and to the abutting property owners.

Now, therefore, in consideration of the foregoing as well as for the consideration to be hereinafter provided, the Board of County Commissioners of Hamilton County, Ohio, adopt the following resolution.

SECTION 1. Be it resolved, that the said, The Millcreek Valley Street Railroad Company, be and is hereby granted the power and right to lay, maintain and use its tracks and to erect, maintain and use the necessary poles and wires for the purpose of operating its cars by electricity or other motive power other than steam on and over said turnpike from its southern terminus in Carthage to the north boundary line of Hamilton County by single or double
485 tracks together with necessary switches, turn-outs, loops, cross-overs and connections to and from its main lines with sidings and loops that leave the turnpike, or its said main lines, on either side.

SECTION 2. That said right of way shall be on and over a strip twelve feet and six inches in width, lying on each side of and fifteen feet from the center line of said pike, but where only one side is occupied, The Millcreek Valley Street Railroad Company shall have the right to lay all necessary switches or turn-outs, providing the near rail of said switch or turn-out is not laid less than ten feet from the center line of said pike, and when, for any reason, it becomes necessary or advisable to lay tracks from one side to the other, the said Railroad Company may have the right so to do, providing said crossing is so planked, paved and kept in repair as not to obstruct or impede vehicular travel thereon, and whenever it may become necessary to leave said roadway, for the purpose of entering stations, storing sheds or loading places, or for the purpose of connecting with branch line, it shall have the right so to do. And

when it is deemed necessary by said Railroad Company that track-ways shall be laid in and along the center of the roadway, the consent of the Commissioners of Hamilton County shall first be had and obtained for the laying of said track-ways. Said Railroad Company shall not construct its said track-ways along and upon said turnpike road in a manner that shall in any way impede or interfere with the drainage of said turnpike.

SECTION 3. Said Railroad Company shall replace and restore the portion or portions of said turnpike that may *may*, in any manner, be disturbed by it in the construction of its line; either of track, poles or wire on and over said turnpike in as good order and condition as said Railroad Company found the same prior to such disturbance; and shall keep in repair all that portion of said turnpike lying between its tracks laid therein and thereon, and to a distance of eighteen inches on the outside of the outer rails thereof. And in case it fails so to do, the Commissioners of Hamilton County may, upon and after ten days' notice to said Railroad Company to make said repairs in conformity with the terms and conditions of this right of way, proceed to make said repairs at the cost and expense of the said Railroad Company.

SECTION 4. That all carrying poles shall be placed by the said Railroad Company in such a manner as not to unnecessarily interfere with vehicular travel; and all private and public road-
486 ways, entrances and crossings shall be graded and graveled by the said Railroad Company, to the satisfaction of the Commissioners of Hamilton County, and all grades established for said tracks shall, as near as may be practicable with the requirements of rapid transit, be made to conform in a general way with the existing grades of said roadway.

SECTION 5. It is further agreed and understood that the Railroad Company to whom this right of way is granted, shall commence the construction of said line of street railroad within a period of one year from the date of this instrument and complete the same within a period of two years after commencing said construction, unless such delay is occasioned by obstructions upon the line of the right of way, the removal of which may be contested, or by reason of the procurement of an injunction or other legal interference, otherwise this grant shall cease and *and* determine, and if after said road has commenced the running of its cars it shall cease running said cars and cease to be operated as a street railroad for the carrying of passengers, for a period of nine months, this grant shall cease and determine, and all right acquired hereunder by said Railroad Company shall thereupon terminate and upon demand made therefor by the Commissioners of Hamilton County, said Railroad Company shall remove its tracks and all obstructions from said road and restore said road to the condition in which the same was found at the commencement of the construction of said street railroad, and upon failure so to do, the Commissioners of Hamilton County may enter upon and remove said railroad and all appurtenances thereto and restore the road-bed to its original condition before the construction

of said street railroad thereon, at the expense of said Street Railroad Company.

SECTION 6. And it is further agreed and understood that neither the County of Hamilton nor the Commissioners of Hamilton County, Ohio, shall in any way be liable for any damage either to the abutting property owners or to any person for damages resulting from the construction or operation of said street railroad, nor for any expenses or damages incident to the removal of telegraph and telephone poles, fences or any other obstructions along said roadway necessary to said Railroad Company's enjoyment of said right of way.

SECTION 7. It is further understood and agreed that in consideration of the granting of the right of way herein by Hamilton County through its County Commissioners, the said Millcreek Valley Street

487 Railroad Company, shall maintain, repair and rebuild, whenever necessary during the entire life of this grant, all the bridges and culverts over the route herein specified at its own cost and expense, and under the direction of the County Engineer. The maintenance, repair and rebuilding herein mentioned shall include the approaches to bridges or abutments and floors thereof, together with the painting of iron work and substructure at least once in three years, and all of which shall be done at such times as the Board of County Commissioners may deem necessary and proper.

SECTION 8. It is further understood and agreed that in the event any of said bridges or any section thereof or abutments, or approaches thereto are destroyed by any extraordinary flood, or other casualty, then, and in that case, the Commissioners of Hamilton County are to repair and rebuild such bridge or sections thereof, in such manner as they think proper at the cost and expense of Hamilton County.

SECTION 9. The right herein granted said Street Railroad Company to lay its tracks upon and across bridges and culverts located along said turnpike and the line of said road, is granted upon the condition that, should it be found upon inspection by the County Engineer under the direction and authority of the Board of County Commissioners, said bridges and culverts were not of sufficient strength to carry the cars of said Railroad Company, that said Railroad Company will at its own cost and expense, strengthen said bridges and culverts in a manner subject to the approval of the Commissioners of Hamilton County.

SECTION 10. Any failure on the part of the said The Millcreek Valley Street Railroad Company, its successors and assigns to do and perform any of the conditions above set forth, or the failure to keep in repair as aforesaid, the bridges and culverts along the said road, during the life of this franchise, shall work a forfeiture of the grant herein made, and this grant and franchise shall be null and void from that time, and the Railroad Company shall, upon demand made therefor by the Commissioners of Hamilton County, Ohio, remove their tracks, wires and such other property as it may have upon said turnpike forthwith, and restore said turnpike to as good condition as it was prior to the construction of said street railroad,

and, upon failure, after demand being made therefor, by said Railroad Company to remove said tracks, wires and other property, and to restore said turnpike to the condition in which it was prior to the construction of said road, the Commissioners of Hamilton County shall have the right to enter upon and remove said tracks, 488 wires and other property of said Railroad Company, and to restore said turnpike to the condition in which it was prior to the construction of said street railroad, all at the expense of the said Railroad Company, who shall be liable therefor in an action at law to recover the amount so expended.

SECTION 11. The right herein granted to The Millcreek Valley Street Railroad Company, a corporation, its successors and assigns, is for the term of twenty-five years from the date of its acceptance by the grantee, upon the terms and conditions hereinbefore expressed.

And Mr. Linneman moved:

That the preamble and resolution be ordered received and referred to the Board.

Richardson, No. Linneman, Aye. Breen, No.

Mr. Richardson moved:

That the preamble and resolution be ordered received and adopted.

Richardson, Aye. Linneman, —. Breen, Aye.

Volume 31, Pages 181 and 182. October 6, 1900.

By the Board:

A Resolution.

To amend section 2 of a Resolution passed by the Hamilton County, Ohio, Board of Commissioners on the 14th day of March, 1900, granting to The Millcreek Valley Street Railroad Company, the power and right to lay, maintain and use its tracks, and to erect, maintain and use the necessary poles and wires for the purpose of operating its cars by electricity or other motive power; other than steam, on and over the Hamilton, Springfield and Carthage Turnpike, from its southern terminus in Carthage, to the north boundary line of Hamilton County, by single or double tracks, together with necessary switches, turn-outs, loops, cross-overs and connections to and from its main lines, with sidings and loops that leave the turnpike or its said main lines on either side.

SECTION 1. Be it resolved by the Board of County Commissioners of Hamilton County, Ohio, that Section 2 of a resolution 489 granting to the Millcreek Valley Street Railroad Company the power and right to lay, maintain and use its tracks, and to erect, maintain and use the necessary poles and wires for the purpose of operating its cars by electricity or other motive power, other than steam, on and over the Hamilton, Springfield and Carthage Turnpike, from its southern terminus in Carthage, to the north boundary line of Hamilton County, by single or double

track, together with necessary switches, turn-outs, loops, cross-overs and connections to and from its main lines on either side, be amended so as to read as follows:

SECTION 2. Paragraph 1. That wherever practicable said right of way shall be on and over two strips each twelve and one half ($12\frac{1}{2}$) feet in width, and so located that the inner rail of the tracks to be placed in said strip shall each be ten feet from the *the* center line of said turnpike. Said work to be done according to the directions of the County Commissioners.

Paragraph 2. That the tracks of said company on and over that portion of said turnpike lying adjacent to and crossed by the C. H. & D. Railroad Bridge near Hartwell, Ohio, shall be laid in the center of the space lying between the abutments of said bridge, all work to be done according to the direction of the County Commissioners.

Paragraph 3. That the tracks of said company on and over that portion of said turnpike now lying within the corporate limits of Wyoming shall be laid in the central portion of said turnpike, in accordance with the provisions of the ordinance from said village to said company.

Paragraph 4. That where only one side of said turnpike is occupied by said company it shall have the right to lay all the necessary switches or turn-outs providing the near rail of such switch or turn-out is not less than ten feet from the center line of said turnpike, work to be done according to the direction of the County Commissioners.

Paragraph 5. Whenever for any reason it becomes necessary or advisable to lay tracks from one side to the other, the said Railroad Company shall have the right so to do, provided said crossing is so planked, paved and kept in repair, as not to obstruct or impede vehicular travel thereon, said work to be done according to the direction of the County Commissioners.

Paragraph 6. The drainage which will be necessary to carry the surface water which accumulates under the tunnel of the
490 C. H. & D. Railroad Bridge shall, as well as the drainage that flows into the pipe from the ditch along the south side of the C. H. & D. Railroad, shall be provided for and made by the County Commissioners and the C. H. & D. Railroad, but the railroad company shall pave the roadway through said tunnel or bridge arch between the faces of abutments. Should it become necessary to lower the grade or the pike under the C. H. & D. Railroad tunnel, the Millcreek Valley Street Railroad Company is authorized to make the change, under the directions of the County Commissioners. Clearance shall be at least fifteen feet.

Paragraph 7. That whenever it shall become necessary to leave said roadway for the purpose of entering stations, storing sheds or loading places, or for the purpose of connecting with branch lines, said Railroad Company has a right to do so, and according to the directions of the County Commissioners.

Paragraph 8. At the point north of Wyoming where single track is to be laid, the railroad company shall have the right to lay an additional track, whenever the business of the company requires the same.

SECTION 3. Said original Section 2 of said resolution is hereby repealed.

SECTION 4. This resolution shall take effect and be in force from and after the earliest period allowed by law.

And Mr. Richardson moved:

To adopt the resolution.

Bardes, Aye. Richardson, Aye. Linneman, Aye.

CINCINNATI, December 14, 1901.

This is to certify that the foregoing is a true and correct copy of the proceeding of the Board of Hamilton County Commissioners in the matter relating to franchise of The Millcreek Valley Street Railroad Company to operate over the Hamilton, Springfield and Carthage Turnpike as it appears of record in Vol. 30 and 31, County Commissioners' Minutes.

C. C. RICHARDSON,

Pres. Board of Ham. Co. Commissioners.

[SEAL.]

Attest:

GEO. C. ZIMMERMAN, *Clerk.*

Comp. Ex. No. 10.

491

CINCINNATI, O., July 9, 1896.

To the Honorable The Mayor and Council of the Village of Hartwell, Ohio.

GENTLEMEN: The Cincinnati Incline Plane Railway Company hereby respectfully makes application for leave to construct and lay and maintain and operate the tracks and route of its present electric street railway system leading to and connected with its inclined plane and necessary for the convenient dispatch of its business, from its present terminus at the south corporation line of the Village at Wayne Avenue, to the north or west corporation line thereof, over and along both or either of the following routes, to-wit:

Wayne Avenue to Section Avenue; thence either north on Wayne Avenue to the north corporation line of the Village; or west on Section Avenue to the West corporation line of the Village; or on Section Avenue to Burns Avenue and thence north on Burns Avenue to the north corporation line of the Village, with the right to construct and operate all appurtenances incident and necessary to the proper operation of said electric street railway system.

We respectfully request that proper notice of this application be given by the Clerk of said corporation of Hartwell, as required by law.

Respectfully submitted,

THE CINCINNATI INCLINE PLANE
RAILWAY CO.,

By BRENT ARNOLD, *Receiver.*

H. P. BRADFORD, *G. M.*

Comp. Ex. No. 11.

492 *Notice for Permission to Construct and Operate a Street Railroad.*

Village of Hartwell, Office of Village Clerk.

HARTWELL, OHIO, July 14th, 1896.

Notice is hereby given that the Cincinnati Incline Plane Railway Company, on the 9th day of July 1896 made application to the Council of the Village of Hartwell for permission to construct and operate a Street Railroad on the following streets:

Wayne Avenue to Section Avenue; thence either North on Wayne Avenue to the North Corporation line of the Village, or West on Section Avenue to the West Corporation line of the Village; or on Section Avenue to Burns Avenue, and thence North on Burns Avenue to the North Corporation line of the Village, with the right to construct and operate all appurtenances incident and necessary to the proper operation of said Electric Street Railway System.

T. H. MARPE, *Clerk.*

Above Advertised.

Notice.
July 14th, 1896.

Notice.
July 21st, 1896.

Notice.
July 28, 1896.

I hereby certify the above was published in the Cincinnati Times Star on the 14th day of July 1896, on the 21st day of July 1896 and on the 28th day of July 1896, as per above printed Notices and bill on file in the Clerk's office.

T. H. MARPE, *Clerk.*

[Endorsed:] Notice for permission to construct and operate a Street Railroad by Cin'ti Incline Plane R. R. Co. 9th July 1896. Hartwell, O.

Typewritten and filed in book.

Comp. Ex. No. 12.

493 September 25/96.
To the Honorable The Mayor & Council of the Village of Hartwell, O.

(Ordinance #611.)

GENTLEMEN: The Cincinnati Inclined Plane Railway Company hereby accepts the grant and franchise made to it under the ordinance passed by your honorable board of date Sept. 16/96 but does so only upon the condition, stipulation, and agreement following, that is to say; that within ten days from the receipt of this acceptance the village of Hartwell will deposit the sum of One Thousand Dollars into the hands of C. P. Calvert, to be held by him until the

said company shall have constructed said route and tracks as far as Section Ave. in accordance with the terms of said ordinance and put the same in operation, by the running of cars to said point, when it is agreed that said sum of One Thousand Dollars, (1,000.00) shall be immediately paid to said Company;—The Cincinnati Inclined Plane Railway Company.

By H. P. BRADFORD,
Gen'l Mngr.

BRENT ARNOLD, *Receiver.*

Copy.

Comp. Ex. No. 13.

494 Office of Village Clerk, Hartwell, O. T. Henry Marpe, Clerk.

Oct. 5th, 1896.

H. P. Bradford, Esq., Gen'l Manager The Cin'ti Inclined Plane R'way Co.

DEAR SIR: At a Regular Meeting of Council held this evening the following Resolution was adopted, viz: "Resolved, that the Clerk be instructed to write the Cin. Incline Plane R'w'y Co., that the acceptance by it of Ordinance No. 611 has been received and filed, and that this Board makes no objection to the condition attached thereto. This Board further says, that the raising of the amount named in the acceptance is a voluntary act of the Citizens, and that C. P. Calvert is the representative of the citizens and not of this Board, but that the citizens and this Board are in harmony and a notification to the Company from Mr. Calvert that the fund has been raised will be authoritative."

Very Respectfully,

T. H. MARPE, *Clerk.*

Comp. Ex. No. 14.

(Here follows map marked p. 495.)

MAP

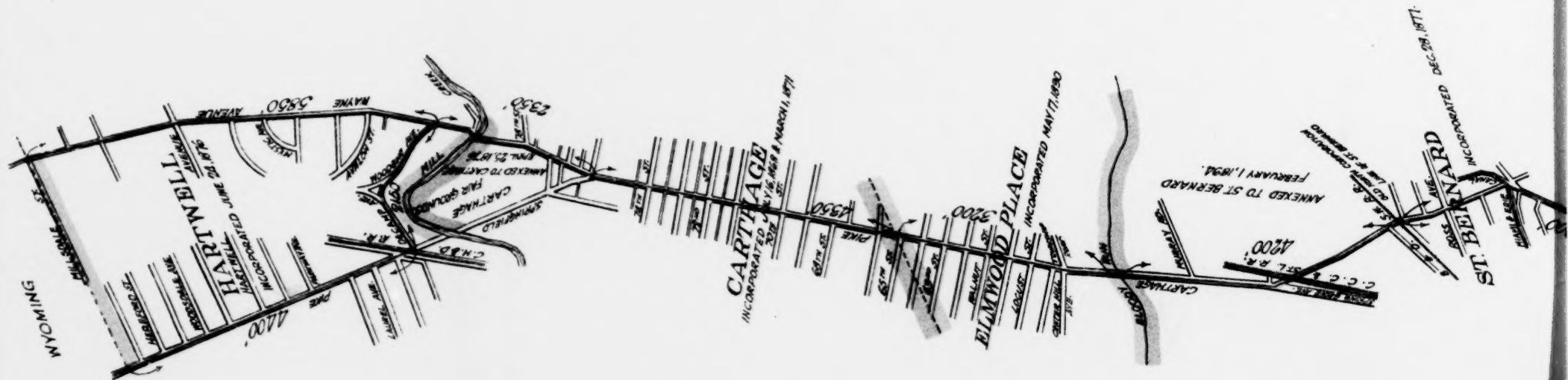
TOO

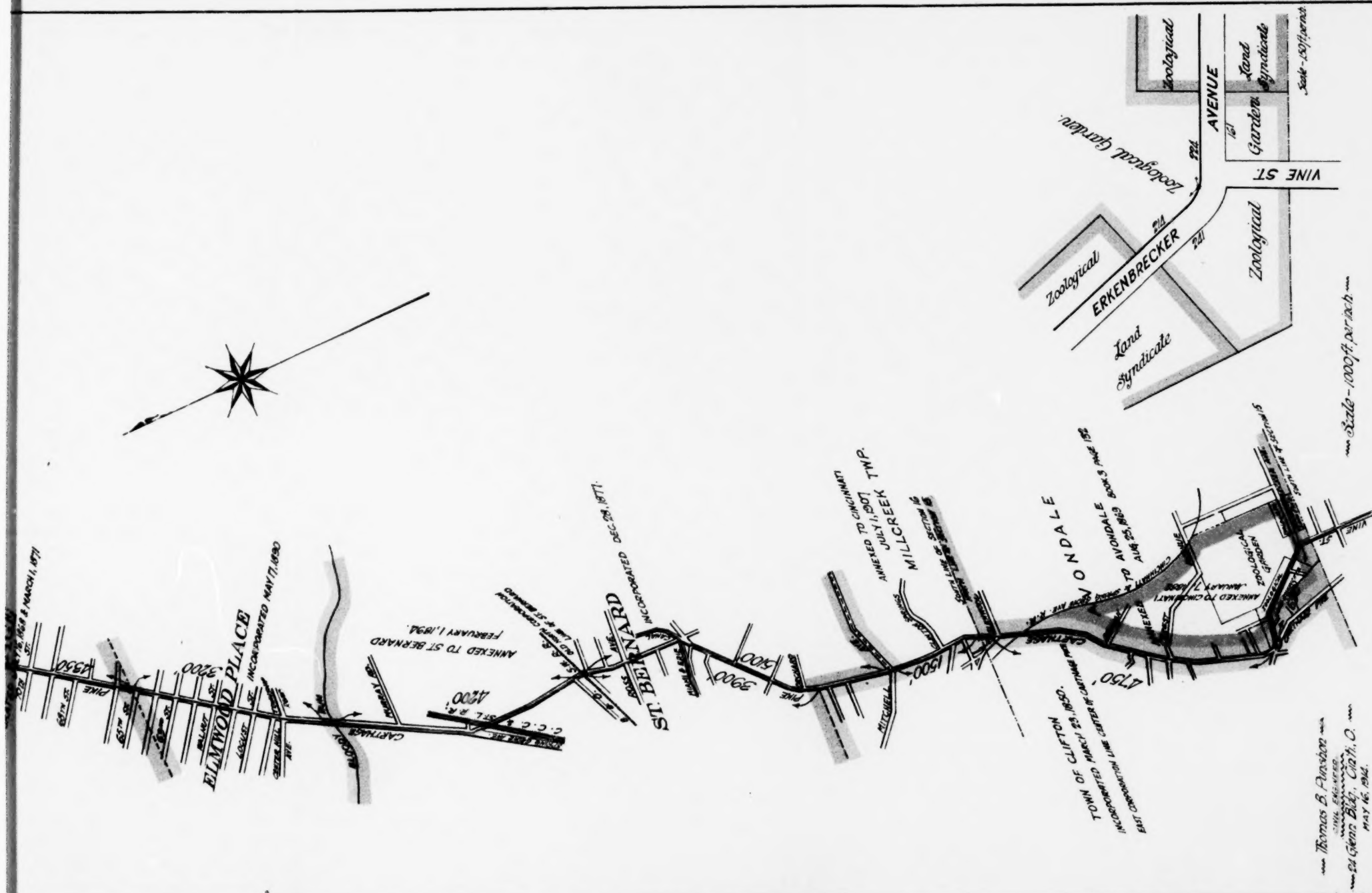
LARGE

FOR

FILMING

Property of City of Cincinnati.
 To be returned to City Solicitor
 (Case. Ex 35. H.D.)

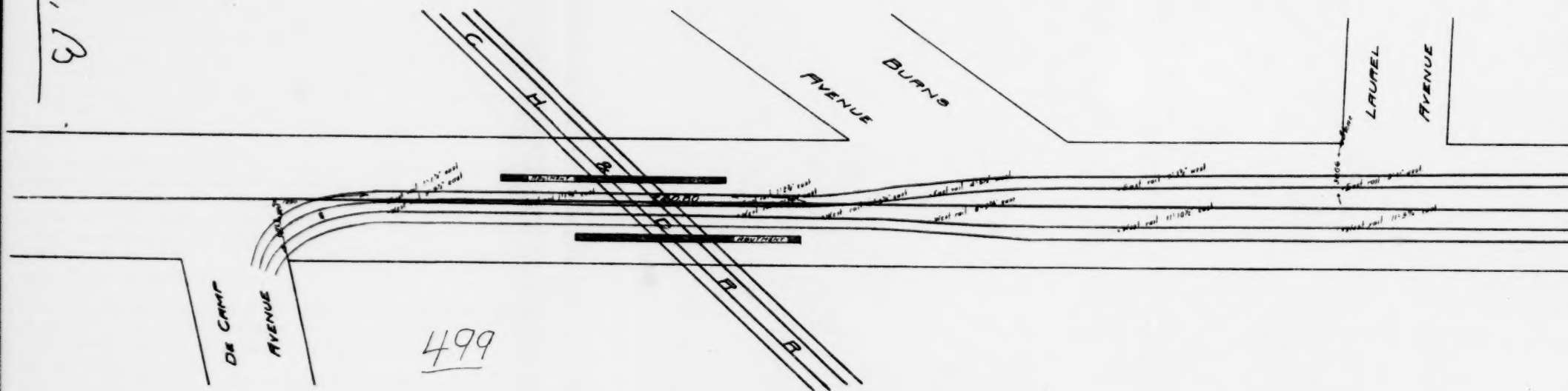


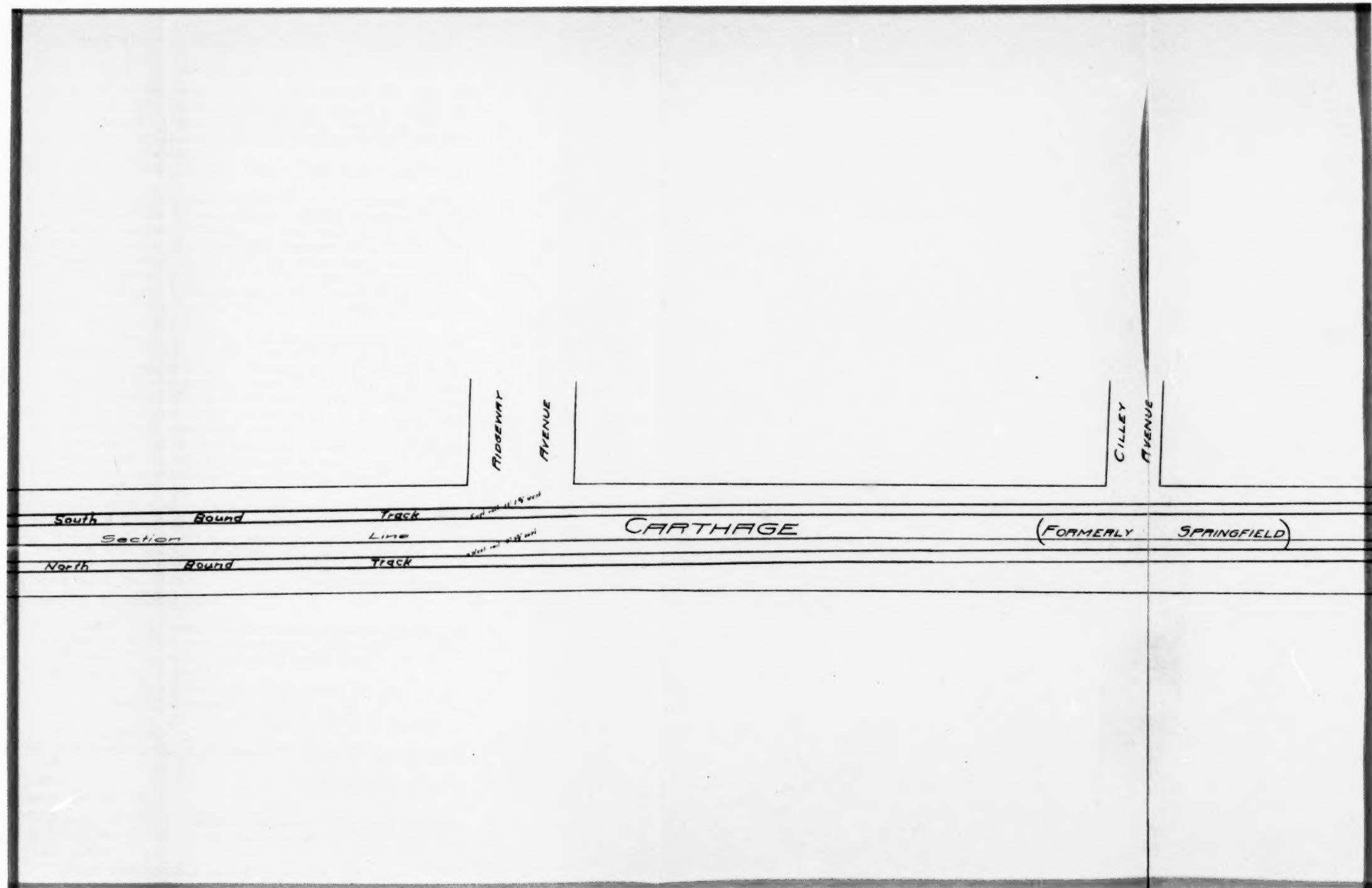


Thomas B. Pansboro with
CIVIL ENGINEER
24 Glenn Bldg., Cincinnati, O.
May 16, 1914.

Property of City of Cincinnati.
To be returned to City Solicitor.
(Case by 35-710.)

24, 13





Survey showing location of car tracks in
CARTHAGE PIKE

with reference to Section Line between
Sections 1 & 7 and 2 & 8 Springfield Tp.

April 13-14-1914

Scale 30 feet = 1 inch

Houston Coates
Deputy County Surveyor

Approved

Clinton Coates
County Surveyor

Section 7

PIKE

East cor. 12' 48" west

East cor. 12' 48" west

South

Bound

West cor. 12' 48" east

Section

Line

West cor. 12' 48" east

North

Bound

PARKWAY

AVENUE

GLENDALE

STREET

Section 1



Section 8

Track

East rail 20' 0" west

Section 8

West rail 0' 2 1/4" east

Track

East rail 20' 0" west

West rail 0' 0" 6" east

CARTHAGE

HARTWELL

AVENUE

Section 2

FERNDALE

STREET

CARTHAGE

(FORMERLY SPRINGFIELD)

South

Bound

PIKE

North

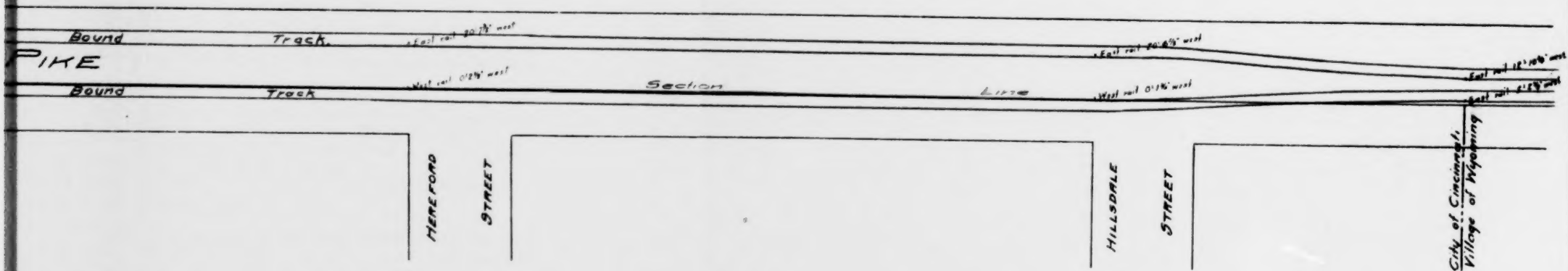
Bound

WOODSDALE

AVENUE

SHEEHAN

AVENUE





496

Ordinance #698.

Granting to the Millcreek Valley Street Railroad Company, the right to lay a double track on the street lying between lots #89 and #95 of the Hamilton County House Building Association Subdivision of Hartwell, and connecting Rural avenue with the street now known as De Camp avenue:

Be it ordained by the Council of the Village of Hartwell, Hamilton County, Ohio:

SECTION 1. That permission be and the same is hereby granted to the Millcreek Valley Street Railroad Company, its successors and assigns, to lay, extend, construct, maintain and operate a double track street railroad, on the street lying between lots #89 and #95 of the Hamilton County House Building Association Subdivision of Hartwell, one track to be laid on each side of the center line of said street; commencing at the intersection of said street with Rural avenue, thence westwardly over said street, which is fifty (50) feet in width, to De Camp avenue.

SECTION 2. This grant is made upon the express terms and conditions, and subject (except as herein provided) to all the terms and conditions contained in Ordinance No. 679, passed by the Council of the Village of Hartwell, on May 14th, 1900, granting to the said Millcreek Valley Street Railroad Company, the right to occupy, and use Rural avenue from its intersection with Wayne avenue to said street, and over said street to De Camp avenue, and westwardly on De Camp avenue to the west corporation line of the Village; and also subject to the suit of the Equitable L. & B. Co. and the Village of Hartwell, et al., #120,051, Ham. Co. Common Pleas Ct.

The grant herein is to be for the same term and no longer than the grant made to the said Millcreek Valley Street Railroad Company, by said Ordinance No. 679, passed on May 14th, 1900.

SECTION 3. This ordinance shall take effect and be in force, from and after the earliest period allowed by law.

Passed April 1st, 1901.

C. P. CALVERT, *Mayor*.

Attest: T. H. MARPE, *Clerk*.

I hereby certify that copies of above named Ordinance #698 were posted at each of the following named public places within the Village of Hartwell, Ohio, on the 11th day of April, 1901, viz.:

One copy at Council Chamber.

" " " Building N. E. corner Park & Ohio avenue.

" " " Maplewood Station, C., H. & D. R. R.

" " " " " C., C., C. — St. L. R. R., and

" " " Hartwell " "

Also sent certified copy to Millcreek V. St. R. R. by mail April 30, 1901.

Attest:

T. H. MARPE, *Clerk*.

Comp. Ex. No. 16.

[Endorsed:] Ordinance #698. Hartwell. Granting the Millcreek Valley Str. R. R. Co. the right to lay a double track, etc. April 21, 1901.

(Here follows maps marked pages 498 and 499.)

499½ County Commissioners' Office, Hamilton County, Ohio.

Fred E. Wesselmann, Pres.; Harry C. Innes, Samuel Weil, Jr.,
Commissioners.

Albert Reinhardt, Clerk.

CINCINNATI, June 4th, 1914.

It is hereby certified that the attached is a true and correct transcript of part of the proceedings had before the County Commissioners of Hamilton County, Ohio, at a session held on the 8th day of September, 1897, as appears of record in Vol. 27, p. 200, Commissioners' Minutes:

In witness whereof, I have hereunto set my hand and affixed the Seal of the Office of the County Commissioners of Hamilton County, Ohio, this 4th day of June, A. D. 1914.

Def't "Ex. C-1."

[Seal County Commissioners, Hamilton County, O.]

ALBERT REINHARDT,

Clerk Board County Commissioners,
Hamilton County, Ohio.

500 County Commissioners' Minutes.

Vol. 27, p. 200.

Road Session.

Hamilton County Commissioners' Office.

CINCINNATI, OHIO, September 8, 1897.

The Board met in session this A. M. Present, Messrs. Breen, Korb and President Bader and County Solicitors Rendigs and Foraker.

The minutes of September 1st, 4th, 6th and 7th were read and approved.

The following communication was submitted and read:

PLEASANT RUN, HAMILTON COUNTY, OHIO.

To the Board of County Commissioners of Hamilton County, Ohio.

GENTLEMEN: The Directors of the Hamilton, Springfield & Carthage Turnpike Company passed the following resolution:—

Resolved, That the Hamilton, Springfield & Carthage Turnpike Company hereby abandon all that part of its turnpike road as lies south of where the Lockland Road known as Wyoming Avenue in Hamilton County, Ohio, crosses or intersects said Hamilton, Springfield & Carthage Turnpike road in the village of Wyoming in said Hamilton County, Ohio, to its southern terminus in the Village of Carthage, Hamilton County, Ohio, being a distance of two miles, more or less.

Resolved, further, That the President of the Company be directed to notify the County Commissioners of Hamilton County, Ohio, of this action.

Adopted September 2, 1897.

J. L. HUSTON, *President.*

And Mr. Breen moved that the communication be received and referred to the County Solicitor for an opinion as to the duties of the Board.

Breen Aye
Korb Aye
Bader Aye

500½ County Commissioners' Office, Hamilton County, Ohio.

Fred E. Wesselmann, Pres.; Harry C. Innes, Samuel Weil, Jr., Commissioners.

Albert Reinhardt, Clerk.

CINCINNATI, June 4th, 1914.

It is hereby certified that the attached is a true and correct transcript of part of the proceedings had before the County Commissioners of Hamilton County, Ohio, at a session held on the 16 day of October, 1897, as appears of record in Vol. 27, p. 291, Commissioners' Minutes:

In witness whereof, I have hereunto set my hand and affixed the Seal of the Office of the County Commissioners of Hamilton County, Ohio, this 4th day of June, A. D. 1914.

[Seal County Commissioners, Hamilton County, O.]

ALBERT REINHARDT,
Clerk Board County Commissioners,
Hamilton County, Ohio.

Def't "Ex. C-2."

501 County Commissioners' Minutes.

Vol. 27, Page 285.

Hamilton County Commissioners' Office,

CINCINNATI, OHIO, SATURDAY, October 16, 1897.

The Board met in session this A. M. Present, Messrs. Breen, Korb and President Bader and Assistant County Solicitor Foraker. The minutes of the previous meeting were read and approved. Page 291.

The County Solicitor submitted the following opinion:

CINCINNATI, October 7, 1897.

To the Honorable Board of Commissioners of Hamilton County, Ohio.

GENTLEMEN: You have referred to this office a communication from J. L. Huston, Esq., President of the Hamilton, Springfield & Carthage Turnpike Company relative to the abandonment of a part of said Hamilton, Springfield & Carthage Turnpike, for an opinion as to the duties of your Board. The communication from Mr. Huston, President of said Turnpike Company enclosed a copy

of a resolution passed by the Directors of the said Turnpike Company, wherein the said company has abandoned all that part of its turnpike road as lies south of where the Lockland Road, known as Wyoming Avenue in Hamilton County, crosses or intersects the said Hamilton, Springfield & Turnpike Road, in the Village of Wyoming, to the southern terminus of said turnpike, in Carthage, the same being a distance of about two miles.

I have carefully examined the law, as to the right of the turnpike company to take such action. It appears that the legislature of Ohio on April 21st, 1890, (O. L. 87, p. 245) passed an act authorizing such action, and Sec. 2 of said act provides as follows:

"The Hamilton, Springfield & Carthage Turnpike Company is hereby authorized to abandon all that part of its turnpike road
502 as lies south of where the Lockland road, in Hamilton County, crosses said Hamilton, Springfield & Carthage Turnpike Road, being a distance of two miles more or less, and said Turnpike Company is hereby granted the right and privilege to erect and maintain a toll road at or near a point where the said Lockland road crosses its turnpike road."

Upon an examination of the statutes and decisions of cases similar to this one, I am of the opinion that the company has a right to abandon that portion of the turnpike named in said act and that the action taken by the said turnpike company is legal; and further, that said turnpike road, between said points, the distance being about two miles, is now what is known in the statutes as an abandoned turnpike.

Section 4876 of the Revised Statutes provides that all macadamized or gravelled roads, which are free roads, whether constructed under general or local laws, by taxation or assessment, or both, or converted by purchase or otherwise from a toll road into a free road by any law and all turnpike roads or parts thereof, unfinished or abandoned by any turnpike company, shall be kept in repair, as provided in chapter 10, which chapter provides for the repair of improved roads.

Under the sections following the above section the Township Trustees are required to keep such roads in repair, within their respective townships, and in accordance with the various sections of said chapter 10. That portion of the said Hamilton, Springfield & Carthage Turnpike which has been abandoned by the action taken by the Directors of said Turnpike Company, is to be kept in repair by the township trustees, in accordance with the sections of law above referred to.

Very respectfully submitted,

WILLIAM RENDIGS,
County Solicitor.

And Mr. Korb moved, that the opinion from the County Solicitor be received and referred to the Board.

Breen	Aye
Korb	Aye
Bader	Aye

503

CINCINNATI, OHIO, January 28, 1889.

To the Hon. Board of Council, Village of Carthage:

The Cincinnati Inclined Plane Railway Company has made application to the Board of County Commissioners of Hamilton County for permission to occupy with double or single tracks with necessary turnouts, appendages and appurtenances of an overhead Electric street railway system, the Carthage Turnpike to its northern terminus at or near the county fair grounds at Carthage, so as to enable the said Company to furnish continuous rapid and safe transportation by electricity, from the Fountain Square in Cincinnati, to the Village of Carthage, and now petition your honorable Body for permission to occupy and operate its said railroad through your Village as above contemplated.

(Signed)

THE CINCINNATI INCLINE PLANE
RAILWAY COMPANY.

Attest:

(Signed) J. M. DOHERTY, *Secretary*.

Def't Ex. "D".

504

Council of the City of Cincinnati, State of Ohio

CLERK'S OFFICE, CITY OF CINCINNATI.

I hereby certify, that the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony whereof, I have hereunto set my name and affixed the Seal of the Clerk's Office, this 3rd Day of June in the year nineteen hundred and fourteen.

FRED SCHUELLER,

Clerk of Council,

By R. PRAUKEN,

Record and Certification Clerk.

505

Minute Book, Volume 3, pages 157-159.

Resolution.

Resolved, That the application of the Cincinnati Incline Plane Railway Company for permission to occupy with double or single tracks, with the necessary appendages and appurtenances of an overhead Electric Street Railway system, the Carthage Turnpike and either of the roads leading to the Carthage Fair Grounds and to operate its said Electric — over and along the same, through the Village of Carthage, be, and the same is hereby granted upon the following terms and conditions, to wit:

1. The rails to be laid down on said route shall have an inside tram of at least four inches.

2. The tracks shall be laid in the middle of the streets or road-

ways and where double tracks are laid they shall be as near together as possible.

3. All side tracks, turn-tables, curves or connections tracks shall be constructed and located under the supervision and direction of Council.

4. The poles or posts shall be of iron or wooden *poles*, the iron posts to be of the same plan and pattern as those prescribed — the City of Cincinnati, the wooden poles if used are to be dressed and neatly painted to the satisfaction of the Council of the Village.

506 5. Said Railroad to be completed from the Hamilton County Fair Grounds to the City of Cincinnati, within twelve months from the acceptance of the grants by said Company (delays caused by legal proceedings or from causes not the fault of said Company or its agents, to be excluded in the computation of time), otherwise said grant to be void.

7. Said grant to be accepted in writing, within thirty days from the passage of this resolution otherwise to be null and void and of no effect.

8. Said tracks to — put in without unnecessary delay or obstruction to the public travel and the streets and roadways to be put in good repair as rapidly as the said tracks are laid.

(Signed)

JAMES A. BRODERICK, *Mayor*.

March 19, 1889.

Attest:

(Signed) E. E. ROSS, *Clerk*.

Def't Ex. "E".

507 Council of the City of Cincinnati, State of Ohio.

CLERK'S OFFICE, CITY OF CINCINNATI.

I hereby certify, that the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony whereof, I have hereunto set my name and affixed the Seal of the Clerk's Office, this 3rd day of June in the year nineteen hundred and fourteen.

FRED SCHUELLER,

Clerk of Council,

By R. PRAUKEN,

Record and Certification Clerk.

508

Minute Book, Volume 3, Page 170.

Resolution.

Resolved, That Section one (1) of the grant to the Cincinnati Incline Plane Railway Company made March 19, 1889, be amended so as to read as follows:

The rails to be laid down on said route through the Village of Carthage to be the regular five inch train rail now in general use, of a "Girder" rail of a pattern used in large cities, provided the rail use- shall be the same rail as is used by the Electric Road in the streets of Cincinnati.

(Signed)

JAMES E. BRODERICK, *Mayor*.

Apr. 16, 1889.

(Signed) E. E. ROSS, *Clerk*.

Def't Ex. "F."

509 Council of the City of Cincinnati, State of Ohio.

CLERK'S OFFICE, CITY OF CINCINNATI.

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the Seal of the Clerk's Office, this 3rd Day of June in the year nineteen hundred and fourteen.

FRED SCHUELLER,

Clerk of Council,

By R. PRAUKEN,

Record and Certification Clerk.

510

CINCINNATI, OHIO, April 16, 1889.

To the Council of the Village of Carthage.

GENTLEMEN: The Cincinnati Incline Plane Railway Company hereby accepts the grant made to it by your Hon. Body on the 20th day of March 1889, and amended on the 16th day of April 1889 giving it the right of way to occupy with double or single tracks, with the necessary turnouts, and with the necessary appendages and appurtenances of an overhead Electric street railroad system, the Carthage Turnpike, and either of the roads leading to the Carthage Fair Grounds, and to operate its said Electric road over and along the same, upon the terms and conditions therein stated.

In Witness Whereof the said Cincinnati Incline Plane Railway Company has hereunto caused its corporate name and seal to be affixed by J. M. Doherty, its Secretary, this 16th day of April, 1889.

(Signed)

CINCINNATI INCLINE PLANE RY. CO.,

H. H. LITTLE, *Pres.*

(Signed)

J. M. DOHERTY, *Secretary*.

Def't "G."

511 Council of the City of Cincinnati, State of Ohio.

CLERK'S OFFICE, CITY OF CINCINNATI.

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the Seal of the Clerk's Office, this fourth day of June in the year nineteen hundred and fourteen.

FRED SCHUELLER,

Clerk of Council,

By R. PRAUKEN,

Record and Certification Clerk.

512 To the Mayor and Council of the Village of Carthage, Hamilton County.

GENTLEMEN: The Cincinnati Inclined Plane Railway Company hereby requests permission to extend its tracks over and along Lockland avenue and Main street of said village from the northern terminus of the Carthage pike to the north corporation line of said village, and to construct its railway and operate its cars by means of electricity over said street, together with all necessary turn-outs, appendages and appurtenances incident to the proper operation of its railway system, and respectfully ask- your honorable board to grant the same.

Very respectfully,

THE CINCINNATI INCLINED PLANE
RAILWAY CO.By H. P. BRADFORD, *General Manager.*

(In pencil on the edge of it, it is dated August 7, 1894.)

Def't Ex. "H."

513 Council of the City of Cincinnati, State of Ohio.

CLERK'S OFFICE, CITY OF CINCINNATI.

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the Seal of the Clerk's Office, this third day of June in the year nineteen hundred and fourteen.

FRED SCHUELLER,

Clerk of Council,

By R. PRAUKEN,

Record and Certification Clerk.

(Here follows map marked page 514.)

CHART S

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515

Recorder's Office.

THE STATE OF OHIO,

Hamilton County, ss:

I, John Doyle, Recorder within and for the County aforesaid, do hereby certify the foregoing to be a true and correct copy of Plat Zoological Land Syndicate Subdivision Cincinnati, Sections 14 & 15, T. 3, F. R. 2 M. P.

Received and recorded on the 27th day of June 1890, in Plat Book No. 9 Pages 49 & 50, Hamilton County, Ohio, Records, and I further certify that I am the keeper of said records and books.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Cincinnati, this 5th day of June, A. D. 1914.

[Seal Recorder's Office, Hamilton County, Ohio.]

JOHN DOYLE, *Recorder.*

Def't Ex. "I."

516 [Endorsed:] Certified Copy of Plat of Zoological Land Syndicate Subdivision Cincinnati. Sections 14 & 15 T. 3, F. R. 2, M. P.

(Here follows map marked page 517.)

THE STATE OF OHIO,
Hamilton County, ss:

I, John Doyle, Recorder within and for the County aforesaid, do hereby certify the foregoing to be a true and correct copy of "Plat" of Subdivision made by Thomas French. Sec. 15, Town 3, F. R. 2 M. P. adjoining Zoological Garden.

Received and recorded on the 8th day of June, 1875, at — o'clock — M., in Plat Book No. 4 Page 244, Hamilton County, Ohio, Records, and I further certify that I am the keeper of said records and books.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Cincinnati, this 5th day of June, A. D. 1914.

[Seal Recorder's Office, Hamilton County, Ohio.]

JOHN DOYLE, *Recorder.*

Def't Ex. "J."

519 [Endorsed:] Certified Copy of "Plat" Made by Thomas French Sec. 15, T. 3, F. R. 2 M. P. adjoining Zoological Garden.

(Here follows map marked page 520.)

521

Recorder's Office.

THE STATE OF OHIO,

Hamilton County, ss:

I, John Doyle, Recorder within and for the County aforesaid, do hereby certify the foregoing to be a true and correct copy of plat of survey and subdivision of two lots of land belonging to Benjamin P. Hinman in Section 15, Town 3, F. Range 2, M. P. one containing 54 Acres more or less conveyed to him by deed dated August 25th, 1865, and the other 11 Acres conveyed to him by David P. Marshall by deed dated July 1, 1865.

Received and recorded on the 1st day of September 1865, in Plat Book No. 2 Page 258, Hamilton County, Ohio, Records, and I further certify that I am the keeper of said records and books.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Cincinnati, this 5th day of June, A. D. 1914.

[Seal Recorder's Office, Hamilton County, Ohio.]

JOHN DOYLE,

Recorder.

522

[Endorsed:] Certified Copy of Plat of Benjamin P. Hinman in Section 15, Town 3, F. Range 2, M. P. Ex. "K." Def't Ex. "K."

523

Deed.

Deed Book 577, p. 132.

George Wilshire et al.

—
John Hauck.

Indenture made this sixth day of November in the year 1884 by and between George Wilshire, Augustus S. Winslow and Frances M. Wilshire, Joseph W. Wilshire and William M. Wilshire, the said Frances, Joseph and William as executors of the last will of William Wilshire, deceased, all of Cincinnati, in the County of Hamilton and State of Ohio, parties of the first part, and John Hauck, of the City and County aforesaid, party of the second part, Witnesseth:

That whereas the said William Wilshire, George Wilshire and Augustus S. Winslow, by a certain indenture of lease made on the 24th day of September in the year 1874 by and between them as lessors and the Zoological Society of Cincinnati as lessee demised and let to the said Zoological Society of Cincinnati in consideration of Ten thousand Dollars (\$10,000.00) then paid by the said lessees to the said lessors and certain rents and covenants and agreements stated in said lease to be paid and performed by said lessee all the following described real estate, to-wit:

First. All those lots and parcels of land in Section No. 15, Town-

ship 3, and Range 2 of the Miami Purchase, marked and designated upon a plat of subdivision of land as recorded in Plat Book No. 2, pages 258 and 259 in the office of the Recorder of Hamilton County, aforesaid, as follows, to wit:

Lots Numbers Three (3) containing one 65/100 (1.65) acres No. Four (4) containing two 62/100 (2.62) acres No. Five 524 (5) containing two 86/100 (2.86) acres, No. Six (6) containing one 59/100 (1.59) acres, No. Seven (7) containing one 59/100 (1.59) acres. No. Eight (8) containing two 42/100 (2.42) acres. No. Nine (9) containing two 54/100 (2.54) acres, No. Ten (10) containing four 24/100 (4.24) acres No. Eleven (11) containing three 15/100 (3.15) acres, No. Twelve (12) containing three 62/100 (3.62) acres No. Thirteen (13) containing three 90/100 (3.90) acres No. Fourteen (14) containing four 88/100 (4.88) acres No. Fifteen (15) containing five 19/100 (5.19) acres No. Sixteen (16) containing four (4) acres No. Seventeen (17) containing five 86/100 (5.86) acres No. Eighteen (18) containing three 98/100 (3.98) acres No. Nineteen (19) containing five 90/100 (5.90) acres No. Twenty (20) containing three 38/100 (3.38) acres.

Second. All that certain lot of land in Section No. 14, Township 3, Second Fractional Range in the Miami Purchase known and described as on the plat of the partition of the Estate of Andrew McMillan, deceased, recorded in Plat Book No. 1, pages 182 and 183, in the Recorder's office in the County of Hamilton aforesaid as Lot No. Fifteen (15) containing two 67/100 (2.67) acres, all the premises above described together aggregating sixty-six (66) acres and four one hundredths (.04) of an acre of land more or less. And in and by the said lease it was covenanted and agreed by the said lessors for themselves, their heirs, executors, administrators and assigns, to and with the said lessee, its executors and assigns, that all rents, taxes and assessments in said lease contained being duly paid and performed by said lessee, they the said lessors will at any time within sixty (60) days after the expiration of ten (10) years from the first day of October in the year Eighteen hundred & Seventy

525 Four (1874) the beginning of the term of ninety-nine (99) years demised by the said lease convey the said entire premises to the said lessee, its executors or assigns by deed of general warranty with release of dower upon payment by said lessee, its executors or assigns, to said lessors, their heirs or assigns of the sum of Two Thousand Dollars (\$2,000.00) per acre, all of which with other matters will more fully appear by the said lease recorded in Lease Book No. 51, at page 57 in the Recorder's Office of the County of Hamilton aforesaid, reference to the same being had for more certainty.

And whereas the Zoological Society of Cincinnati by its deed duly executed under its corporate sale to John Hauck November 5, 1884, and recorded in Book — No. — page in the said Recorder's Office has sold, assigned and transferred to the said John Hauck, his heirs and assigns all of the said leasehold and right on privilege of purchase so granted by the said lessors to the said lessee above named. And whereas said period of ten years limited to the right of purchase

has expired and the said John Hauck within the period of sixty (60) days thereafter having requested a conveyance to him by the said lessors of all the said premises above described by deed of general warranty in fee simple and having offered to pay them for the same the price above stipulated as provided in said lease.

And whereas said William Wilshire, one of the lessors aforesaid, died on or about the 17th day of October in the year 1875 leaving a last will and testament which was duly proven and admitted to record in the Probate Court of the county of Hamilton aforesaid, and thereby

appointed the said Frances M. Wilshire, Joseph W. Wilshire
526 and William M. Wilshire to be the executors of said will and the said executors were duly qualified and letters, testamentary upon the estate of the said William Wilshire was duly issued to them by the said court and accepted by them; and whereas in a certain suit by them in the court of common pleas in the County of Hamilton aforesaid, No. 71454 as executors of the last will of said

William Wilshire against Sarah Perkins and others who, together with the said Frances, Joseph and William M. Wilshire are the devisees of the estate of said William Wilshire under said will praying the authority and order of the said court to the said executors for carrying out, performing and completing jointly with the said George Wilshire and Augustus S. Winslow the sale and conveyance of all the said real estate in conformity with their covenants aforesaid and in accordance with the said lease such proceedings were had that by an order of the said court in said suit on the third day of November, A. D. 1884, the said executors of the last will of William Wilshire, deceased, were directed to complete the said contract of sale on the part of the said William Wilshire, his heirs, executors and assigns, and to join with the said George Wilshire and Augustus S. Winslow upon payment of the said price of Two Thousand Dollars (\$2000.00) per acre, deducting the sum of Ten Thousand Dollars (\$10,000.00) paid in advance as aforesaid, and the rent taxes and assessments accrued under said lease in conveying to the said John Hauck in fee simple by a good and sufficient deed of general warranty with release of dower the entire premises demised in and by the said indenture

of lease so as fully and completely to vest in the said John
527 Hauck, his heirs and assigns all estate, title and interest therein held by the said William Wilshire or by the parties in the said suit as his heirs, devisees or otherwise, and which will more fully appear by the files and records of the said proceedings in the said court, reference to the same being had.

Now, therefore we, the said George Wilshire and Augustus S. Winslow, together with the said Francis M. Wilshire, Joseph W. Wilshire and William M. Wilshire, executors of the last will of the said William Wilshire, deceased, hereunto duly authorized and empowered by the said order of the court of common pleas of Hamilton County, Ohio, in consideration of One Hundred and twenty-two Thousand and Eighty Dollars (\$122,080.00) to us paid by the said John Hauck, being the price stipulated in said lease, after deducting the Ten Thousand Dollars (\$10,000.00) paid in advance, receipt of which is hereby acknowledged, do hereby Grant, Sell and Convey

to the said John Hauck, his heirs and assigns, all the said lots of land hereinbefore described as demised by the said lease together with the privileges and appurtenances thereof, to have and to hold the same to the said John Hauck, his heirs and assigns forever, they the said grantors hereby covenanting for themselves, their heirs and representatives that the premises so conveyed, subject to the lease aforesaid, are free and clear of any incumbrances and that they will warrant and defend the title of the same to the said John Hauck, his heirs and assigns, against all persons lawfully claiming the same.

In testimony whereof, the said George Wilshire and Augustus S. Winslow, and said Francis M. Wilshire, Joseph W. Wilshire
528 and William M. Wilshire, executors of the last will of William Wilshire, deceased, together with Susan E. Wilshire, the wife of the said George Wilshire, Susan L. Winslow, wife of the said Augustus S. Winslow, and the said Frances M. Wilshire, widow of the said William Wilshire, deceased, who hereby severally release all rights of dower in the premises hereby conveyed, have hereunto set their hands and seals on the sixth day of November in the year 1884.

Signed, sealed and delivered in the presence of us:

(GEORGE K. THOMPSON,)

(ALFRED M. ALLEN,)

As to—

GEORGE WILSHIRE.
SUSAN E. WILSHIRE.
AUGUST S. WINSLOW.
JOSEPH W. WILSHIRE, *Ex'r.*
WILLIAM M. WILSHIRE, *Ex'r.*

(J. B. PERKINS,)

(Z. M. HUBBELL,)

As to—

FRANCES M. WILSHIRE.
FRANCES M. WILSHIRE, *Ex'r.*

(MARY A. HALSEY,)

(CHARLES HALL ADAMS,)

As to—

SUSAN L. WINSLOW.	[SEAL.]
GEORGE WILSHIRE.	[SEAL.]
SUSAN E. WILSHIRE	[SEAL.]
AUGUSTUS S. WINSLOW.	[SEAL.]
SUSAN L. WINSLOW.	[SEAL.]
FRANCES M. WILSHIRE, <i>Ex'r.</i>	[SEAL.]
JOSEPH W. WILSHIRE, <i>Ex'r.</i>	[SEAL.]
WILLIAM M. WILSHIRE, <i>Ex'r.</i>	[SEAL.]
FRANCIS M. WILSHIRE.	[SEAL.]

529 STATE OF OHIO,
Hamilton County, ss:

Before me, the subscriber, a notary public in and for said county, personally appeared George Wilshire, Susan E. Wilshire, his wife,

Augustus S. Winslow, and Joseph W. Wilshire and William M. Wilshire, two of the executors, grantors in the foregoing deed, and acknowledged the signing and sealing thereof as their voluntary act and deed. And the said Susan E., wife of the said Goerge Wilshire, being thereupon examined by me and the contents of the said deed read and explained by me to her, declared that she did voluntarily sign, seal and acknowledge the said deed and that she is still satisfied therewith.

Witness my hand and notarial seal this 6th day of November, 1884.

[N. P. SEAL.]

ALFRED M. ALLEN,
Notary Public, Hamilton County.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Before me, the subscriber, a commissioner dully appointed by the Governor of the State of Ohio and residing in said county to take acknowledgment of deeds to be recorded in said State of Ohio, personally appeared Susan L. Winslow, the wife of Augustus S. Winslow, and one of the grantors of the foregoing deed, and acknowledged the signing and sealing thereof to be her voluntary
530 act and being, thereupon examined by me separate and apart from her said husband and the contents of the said deed being by me read and explained to her, declared that she did voluntarily sign, seal and acknowledge the same and that she is still satisfied therewith.

In witness whereof, I have hereunto set my hand and seal of office as commissioner this tenth day of November, A. D. 1884.

[COMMISSIONER'S SEAL.]

CHARLES HALL ADAMS,
Commissioner of the State of Ohio.

STATE OF OHIO,
Cuyahoga County, ss:

Before me, the subscriber, a notary public in and for said county, personally appeared Frances M. Wilshire, widow of the said William Wilshire, deceased, one of the grantors in the foregoing deed, and acknowledged the signing and sealing thereof, both individually and as one of the executors of the will of William Wilshire, deceased, as her voluntary act and deed.

Witness my hand and notarial seal this 7th day of November, 1884.

[N. P. SEAL.]

Z. M. HUBBELL,
Notary Public, Cuyahoga County, Ohio.

Received for record November 4, 1884, at 4.33 o'clock P. M.

THE STATE OF OHIO,
Hamilton County, ss:

I, John Doyle, Recorder within and for the County aforesaid, do hereby certify the foregoing to be a true and correct copy of deed from George Wilshire et al. to John Hauck.

Received and recorded on the 4th day of November, 1884, at 4:33 o'clock P. M., in Deed Book No. 577, Page 132, Hamilton County, Ohio, Records, and I further certify that I am the keeper of said records and books.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Cincinnati, this 5th day of June, A. D. 1914.

[Seal Recorder's Office, Hamilton County, Ohio.]

JOHN DOYLE, *Recorder.*

[Endorsed:] Certified copy of deed from George Wilshire et al. to John Hauck. Def't Ex. "L."

Lease Book 77, p. 203.

[On left hand margin:] Received under the within lease the sum of fifty thousand dollars (\$50,000.00) part of the purchase money of the premises as therein provided and the rent of said premises from this date proportionately reduced and the balance of the purchase money remaining unpaid upon privilege of purchase is \$85,000.

Witness my hand and seal this 3rd day of February A. D. 1887.

JOHN HAUCK.

Attest:

JOHN DEWALD.

Entered May 22nd 1889.

GEO. HOBSON, *Recorder.*

John Hauck

Zoological Society of Cincinnati.

This indenture of lease, made this 13th day of March, A. D., 1885, between John Hauck, lessor, and the Zoological Society of Cincinnati, a corporation under the laws of Ohio, lessee, witnesseth:

That said lessor for and in consideration of the rents herein reserved, of covenants and agreements herein contained and by the said lessee, its successors and assigns to be paid and performed, does here Grant, Lease and Demise to the said lessee, its successors and assigns, all the following described real estate, to wit:

All those lots and parcels of land in Section No. 15, Town 3 and Range 2 of the Miami Purchase, marked and designated upon a plat of subdivision of land as recorded in Plat Book No. 2, pages 258 and 259, in the office of the Recorder of Hamilton County, Ohio, as follows, to wit:

Lot No. 3 containing one 65/100 (1.65) acres No. 4 containing two 62/100 (2.62) acres No. 5 containing two 86/100 (2.86) acres, No. 6 containing one 59/100 (1.59) acres. No. 7 containing one 59/100 (1.59) acres. No. 8 containing two 42/100 (2.42) acres. No. 9 containing two 54/100 (2.54) acres, No. 10 containing four 24/100 (4.24) acres No. 11 containing three 15/100 (3.15) acres, No. 12 containing three 62/100 (3.62) acres No. 13 containing three 90/100 (3.90) acres No. 14 containing four 88/100 (4.88) acres No. 15, containing five 19/100 (5.19) acres. No. 16 containing four (4) acres No. 17 containing five 86/100 (5.86) acres. No. 18 containing three 98/100 (3.98) acres. No. 19 containing five 90/100 (5.90) acres No. 20 containing three 38/100 (3.38) acres.

Excepting, however, a strip off the southwest corner of the above described lot No. 3 and a strip off the westerly side of said lots Nos. 7 and 8, heretofore conveyed to Thomas French by deed recorded in Book 449, page 274, Hamilton County Records; also including in this lease a strip of land in the northeast corner of Lot No. 2 and a small strip on the easterly side of Lot No. 1 of the aforesaid subdivision, as described in deed from Thomas French to William Wilshire et al. recorded in Book 448, page 469, Hamilton County Records, also that lot of land in Section 14, Township 3, Fractional Range 2, Miami Purchase, described in the plat of partition of Andrew McMillan's Estate, recorded in Plat Book 1, page 182, in the Recorder's office aforesaid as Lot No. 15, containing two 67/100 (2.67) acres.

To Have and to hold the same together with the privileges and the appurtenances thereunto appertaining and belonging, unto the said lessee, its successors and assigns for and during the full term of ninety-nine (99) years next ensuing from the 13th day of March, A. D. 1885, fully to be completed and ended and renewable forever, the said lessee, its successors and assigns yielding and paying therefor yearly and every year during this demise the sum of Eighty-one Hundred Dollars (\$8,100.00) payable in equal quarterly installments of Two Thousand and Twenty-five Dollars (\$2,025.00) on the thirteenth days of June, September, December and March of every year during the continuance of this lease, and the said lessee, for itself and for its successors and assigns, does hereby covenant and agree to and with the said lessor, his heir and assigns, that
 534 it will well and truly pay unto the said lessor, his heirs and assigns, the yearly rent above reserved at the days and times and in the manner above specified, and further that it will in addition to the rent aforesaid reserved, pay all the taxes, rates, charges and assessments that may at any time during this demise be levied, rated charged or assessed on said premises, or any part thereof, for any purpose whatsoever, and that for the better securing the pay-

ment of said rents and the performance of the covenants herein contained and by the said lessee to be kept and performed, the said lessor, his heirs and assigns, shall have a first lien paramount to all others upon every right and interest of the said lessee to or in the above described premises and further that said lessee, its successors or assigns, will not commit or suffer any waste upon said premises, and that it will at the expiration of said term or sooner determination of this lease peaceably and quietly deliver up said premises to the said lessor, his heirs or assigns, and the said lessor for himself and for his heirs, executors, administrators and assigns, further covenants and agrees to and with the said lessee, its successors and assigns, that (all rents, taxes and assessments being paid and all covenants being performed by said lessee as herein stipulated), said lessor will at any time after three (3) months notice in writing being first given) during the continuance of this lease convey the said premises to said lessee, its successors and assigns, by a good and sufficient deed of general warranty in release of dower upon the payment to him by said lessee, its successors or assigns, of

535 the sum of One Hundred and Thirty-five Thousand Dollars (\$135,000.00), and the said lessor for himself, his heirs and assigns does further covenant and agree with the lessee that in case said lessee shall make a sale of any part of the lands hereby leased during the term of this lease he will, whenever they may demand the same, execute a deed therefor in fee simple to said lessees the purchasers, as they may elect, on payment to him of the amount of the consideration of said sale, but no part of said land shall be sold at a less rate than stipulated for in this lease, and in case of such sale or sales the rents herein reserved shall be ratably reduced from the date thereof, provided, however, and these presents are upon these express conditions, that if at any time during this demise the rent aforesaid reserved, or any part thereof, shall be in arrear or unpaid in all or in part for the space of thirty (30) days after the same shall have become due and payable and after demand of payment made personally or on said premises, which demand of payment shall be equally good and effectual whether made on the day of payment or at any time afterward, or if the said lessee, its successors or assigns shall fail to pay all taxes, rates, charges and assessments that may at any time during this demise be levied, rated, charged or assessed on said premises as the same may be required, or if said lessee, its personal representatives, successors and assigns shall fail faithfully to keep and perform any other covenant or agreement herein contained and by it or them to be kept and performed, that then or in either such case this lease shall cease, determine and be void, and it shall and may be lawful for the said lessor, his heirs, executors, administrators, or assigns to enter

536 upon the said premises with the appurtenances or part thereof in the name of the whole and the same to occupy and repossess as though this demise had not been made and the said lessee, its successors and assigns, and all others claiming under it, or them, from thence utterly to expel, remove and put out, anything in these presents contained to the contrary thereof notwithstanding, and the

said lessor, for himself and for his heirs and assigns, does hereby covenant and agree to and with the said lessee, its successors and assigns, that upon the payment of the rents and the performance of the covenants aforesaid, said lessee shall and may peaceably and quietly have and enjoy the aforesaid premises with the appurtenances for and during the term aforesaid free from any let or hindrance by said lessor, his heirs or assigns, or any other person or persons whatsoever.

In witness whereof, the said John Hauck has herein set his hand and seal and to a duplicate hereof and the Zoological Society of Cincinnati by its President duly authorized thereto has signed its corporate name and affixed its seal on the day and year first above written.

JOHN HAUCK. [SEAL.]
 ZOOLOGICAL SOCIETY OF CINCINNATI,
 By A. E. BURKHARDT, *President*. [SEAL.]

[Zoological Society Seal.]

Signed and sealed in the presence of us:

ALB. ERKENBECHER.
 JOHN DEWALD. *

537 STATE OF OHIO,
County of Hamilton, ss:

Be it remembered, that on the 13th day of March, in the year A. D. 1885, and before me, the subscriber a notary public in and for said country, personally came John Hauck and the Zoological Society of Cincinnati, by Adam E. Burkhardt, President, the parties named in the foregoing lease, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

[N. P. SEAL.]

JOHN DEWALD,
Notary Public, Hamilton County, Ohio.

Received for record March 14, 1885, at 3:45 o'clock P. M.

538 Recorder's Office.

THE STATE OF OHIO,
Hamilton County, ss:

I, John Doyle, Recorder within and for the County aforesaid, do hereby certify the foregoing to be a true and correct copy of lease from John Hauck to Zoological Society of Cincinnati.

Received and recorded on the 14th day of March, at 3:45 o'clock P. M., in Lease Book No. 77 Page 203, Hamilton County, Ohio, Records, and I further certify that I am the keeper of said records and books.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Cincinnati, this 5th day of June A. D. 1914.

[Seal Recorder's Office, Hamilton County, Ohio.]

JOHN DOYLE, *Recorder.*

[Endorsed:] Certified copy of Lease from John Hauck to Zoological Society of Cincinnati. Def't Ex. "M."

539

DEF'TS' EX. "N."

Deed.

The Zoological Society of Cin'ti
to
Albert G. Erkenbrecker et al.

Know all men by these presents:

That the Zoological Society of Cincinnati, a corporation duly organized under the Laws of the State of Ohio, in consideration of Forty thousand (\$40,000.00) dollars, to it paid by Florence Marmet, Julius Dexter, and Albert G. Erkenbrecker, of Cincinnati Hamilton County, Ohio, the receipt whereof is hereby acknowledged, does hereby Remise, Release and Forever Quit Claim, to the said Florence Marmet, Julius Dexter and Albert G. Erkenbrecker, their heirs and assigns forever;

All those certain lots or parcels of land, in the Village of Avondale, Hamilton County, Ohio, lying and being in section 15, Township 3, Fractional Range 2, of the Miami Purchase, and described as follows: Beginning on the south line of said section, 15, at the south-east corner of lot No. 20, on a plat of subdivision made by B. F. Hinman as recorded in plat book 2 page 258 Hamilton County Ohio Records; thence north along the east line of said Hinman's subdivision 360 feet; thence west parallel with the south line of section 15, 600 ft., thence south parallel to said Hinman's east line 360 ft., to the south line of section 15, thence east on said south line 600 ft., to the place of beginning; being parts of lots 10, 19 and 20 on said Hinman's subdivision, and containing 4 96/100 acres of land. Also beginning at a point in the east line of lot No. 35, of Thomas French's subdivision, as recorded in plat book 4, page 244, Hamilton County Ohio Records; said point being 104 4/100 ft. south of Dexter Avenue, measured along the east line of said lot 35, thence N. 23° 59' W. along the east line of said French's sub. 465.62 ft., to the northeast corner thereof thence N. 88° 30' W. 318.70 ft. to a point in the center of the Carthage Pike, thence along said pike N. 11° 45' W. 258.88 ft., N. 38° 30' W. 281 ft. N. 57° 35' W. 108.48 ft. to the south line of a tract owned by F.A. Knabe; thence south 88° 30' E. 650.22 ft., thence south 2° 06' W. 80 ft., thence south 40° E. 864.74 ft., thence south 50° W. 155 ft.; thence south 40° E. 25 ft. thence south 50° W. 300.42 ft. to the place of beginning, contain-

ing 11.93 acres of land and being parts of lots 2, 3, 5, 6, 7, 8, 9, 11, and 12 and all of lot 4, on said Hinman's subdivision,

Also beginning in the center of Forest Avenue N. E. Corner of lot No. 17, on said Hinman's sub., thence west along the center of Forest Avenue 280 ft., more or less to the east line of the right of way of the Spring Grove and Avondale and Cincinnati Railway, thence southeastwardly along the line of the right of way of said railroad, 465 ft. more or less to the east line of lot No. 17 aforesaid; thence north along said east line 364 ft. more or less to the place of beginning; and containing 1.44 acres of land.

Also all that certain lot in section 14. T. 3 F. R. 2 M. P. being lot No. 15, on plat made by heirs of A. McMillan, as recorded in plat book No. 1, page 182, Hamilton County Ohio records, said lot measuring 490.05 ft. from east to west, and 237.60 ft. from north to south and containing 2.67 acres of land.

Also all the Estate, Title and Interest of the said Zoological Society of Cincinnati, either in Law or in Equity, of in and 540 to the said premises. Together with all the privileges and appurtenances to the same belonging and all the rents, issues and profits thereof; To have and to hold the same to the only proper use of the said Florence Marmet. Julius Dexter and Albert G. Erkenbrecker, their heirs and assigns forever.

In Witness Whereof, the said The Zoological Society of Cincinnati, and has by its President thereunto duly authorized hereunto set its hand and seal, this 3rd day of February, in the year of our Lord, one thousand eight hundred and eighty-seven.

THE ZOOLOGICAL SOCIETY OF CIN'TI.

O. A. E. BURKHART, *President*.

Attest:

[COR. SEAL.]

CHAS. F. McLEAN, *Sec'y*.

Signed, Seales and acknowledged in presence of us:

J. HARTWELL CABELL.

ALB. ERKENBRECKER.

GEO. H. KATTENHORN.

STATE OF OHIO,

County of Hamilton, ss:

Be it Remembered that on the 3rd day of February, in the year of our Lord, one thousand eight hundred and eighty-seven before me, J. H. Cabell, a Notary Public, personally came The Zoological Society of Cincinnati, by A. E. Burkhardt, its President, the grantor in the foregoing deed, and acknowledged the signing and sealing thereof to be its voluntary act and deed, for the uses and purposes therein mentioned.

In Testimony Whereof; I have hereunto subscribed my name and affixed my Notarial seal on the day and year aforesaid.

[N. P. SEAL.]

J. HARTWELL CABELL,

Notary Public, Hamilton County, Ohio.

Rec'd for Record—June 27th, 1890, at 4.40 o'clock P. M.

541

Recorder's Office.

THE STATE OF OHIO,

Hamilton County, ss:

I, John Doyle, Recorder within and for the County aforesaid, do hereby certify the foregoing to be a true and correct copy of deed from Zoological Society of Cincinnati to Albert G. Erkenbrecker et al.

Received and recorded on the 27th day of June, 1887, at 4.40 o'clock P. M., in Deed Book No. 696, Page 130, Hamilton County, Ohio Records, and I further certify that I am the keeper of said records and books.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Cincinnati, this 18th day of May, A. D. 1914.

[Seal Recorder's Office, Hamilton County, Ohio.]

JOHN DOYLE, *Recorder.*

[Endorsed:] Certified Copy of deed from Zoological Society of Cin'ti to Albert G. Erkenbrecker et al. Syndicate. 1.50 collect.

542

"Deed."

John Hauck

—
Florence Marmet et al.

Know all men by these presents:

That John Hauck, of the City of Cincinnati, Hamilton County, Ohio, in consideration of fifty thousand (50,000/00/100) dollars to him paid by Florence Marmet, Julius Dexter and Albert G. Erkenbrecher, all of the same City and State aforesaid, the receipt whereof is hereby acknowledged, does hereby Grant, Bargain, sell and Convey to the said Florence Marmet, Julius Dexter and Albert G. Erkenbrecher, their heirs and assigns forever.

All those certain lots or parcels of land in the Village of Avondale Hamilton County Ohio, lying and being in section 15, Township 3, Fractional Range 2, of the Miami Purchase, and described as follows; Beginning in the south line of said section 15 at the south east corner of lot No. 20 on a plat of Subdivision made by B. F. Hinman as recorded in plat book 2, page 258, Hamilton County Ohio Records, thence north along the east line of said Hinman's Subdivision 360 feet, thence west parallel with the south line of section 15, 600 feet; thence south parallel to said Hinman's east line 360 feet to the south line of section 15, thence east on said south line 600 feet to the place of beginning, being parts of lots 10, 19 and 20 on said Hinman's Subdivision and containing 4 and 96/100 acres of land, also beginning at a point in the east line of lot No. 35, of Thomas French's Subdivision as recorded in Plat Book 4, page 244 Hamilton County Ohio Records; said point being

104 & 4/100 feet south of Dexter Avenue, measured along the east line of said lot 35, thence N. $23^{\circ} 59'$ W. along the east line of said French's Sub. 465.62 feet to the northeast corner thereof, thence N. $88^{\circ} 30'$ W. 318.70 feet to a point in the center of the Carthage Pike, thence along said Pike N. $11^{\circ} 45'$ W. 258.88 feet, N. $38^{\circ} 30'$ W. 281 feet N. $57^{\circ} 57'$ W. 115 feet N. $20^{\circ} 35'$ W. 108.48 feet to the south line of a tract owned by F. A. Knabe, thence south $88^{\circ} 30'$ E. 650.22 feet, thence south $2^{\circ} 03'$ W. 80 feet thence south 40° E. 864.74 feet, thence south 50° W. 155 feet thence south 40° E. 25 feet, thence south 50° W. 300.42 feet to the place of beginning, containing 11.93 acres, of land and being parts of lots 2, 3, 5, 6, 7, 8, 9, 11 and 12, and all of lot 4, on said Hinman's Subdivision, Also beginning in the center of Forest Avenue, N. E. corner of lot No. 17 on said Hinman's Sub., thence west along the center of Forest Avenue 280 feet more or less to the east line of the right of way of the Spring Grove and Avondale and Cincinnati Railway, thence southeastwardly along the line of the right of way of said Railroad 465 feet more or less to the east line of lot No. 17

543 aforesaid, thence north along said east line 364 feet more or less to the place of beginning, and containing 1.44 acres of land, also all that certain lot in section 14, Town 3, F. R. 2, M. P. being lot No. 15 on plat made by heirs of A. McMillan, as recorded in plat book No. 1, page 182, Hamilton County, Ohio Records, said lot measuring 490.05 feet from east to west and 237.60 feet from north to south and containing 2.67 acres of land;

And all the estate, title and interest of the said John Hauck, either in law or in equity, of in and to the said premises; Together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; To have and to hold the same to the only proper use of the said Florence Marmet, Julius Dexter and Albert G. Erkenbrecher, their heirs and assigns forever.

And the said John Hauck, for himself and for his heirs, executors and administrators, does hereby covenant with the said Florence Marmet, Julius Dexter and Albert G. Erkenbrecher, their heirs and assigns, that that he is the true and lawful owner of the said premises, and has full power to convey the same; that the title so conveyed is Clear, Free and Unincumbered; and further, that he will warrant and defend the same against all claim or claims of all persons whomsoever.

In witness whereof, The said John Hauck, and Catherine Hauck, his wife — does hereby release her right and expectancy of dower in said premises, have hereunto set their hands, and seals, this 31st day of January in the year of our Lord, one thousand eight hundred and eighty-seven.

JOHN HAUCK. [SEAL.]
CATHERINE HAUCK. [SEAL.]

Signed, sealed and acknowledged in presence of us:

EUGENE SULLIVAN.
JOHN DEWALD.

THE STATE OF OHIO,
County of Hamilton, ss:

Be it remembered, That on the 31st day of January, in the year of our Lord, one thousand eight hundred and eighty-seven, before me, the subscriber, a Notary Public, in and for said County, personally came John Hauck and Catherine Hauck, his wife, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed, for the uses and purposes therein mentioned.

And the said Catherine Hauck wife of the said John Hauck, being examined by me separate and apart from her said husband, and the contents of said deed being by me made known and explained to her as the statute directs, declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith as her voluntary act and deed for the uses and purposes therein mentioned.

544 In testimony whereof, I have hereunto subscribed my name, and affixed my Notarial seal, on the day and year last aforesaid.

[N. P. SEAL.]

JOHN DEWALD,
Notary Public, Ham. Co., Ohio.

Rec'd for Record Feb'y 4th 1887 at 4.10 o'clock P. M.

545

Recorder's Office.

THE STATE OF OHIO,
Hamilton County, ss:

I, John Doyle, Recorder within and for the County aforesaid, do hereby certify the foregoing to be a true and correct copy of Deed from John Hauck to Florence Marmet et al.

Received and recorded on the Fourth day of February, 1887, at 4.10 o'clock P. M., in Deed Book No. 628, Page 181, Hamilton County, Ohio, Records, and I further certify that I am the keeper of said records and books.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Cincinnati, this Nineteenth day of May, A. D. 1914.

[Seal Recorder's Office, Hamilton County, Ohio.]

JOHN DOYLE, Recorder.

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[Endorsed:] Certified Copy of Deed from John Hauck to Florence Marmet et al Def't Ex. "O."

"EXHIBIT P."

Hamilton County Court of Common Pleas.

ROBERT ALLISON, JOHN HAUCK, A. E. BURKHARDT, GEORGE Fisher, Lewis Van Antwerp, Christian Moerlein, Gottlieb Muhlhauser, Henry Mulhauser, Herman Lackman, Larz Anderson, G. A. Frank, J. T. Carew, Charles P. Taft, Alexander McDonald, The Gerke Brewing Company, a Corporation under the Laws of the State of Ohio, Ferdinand Vogler and Otto Stein, Partners, Doing Business under the Firm Name and Style of F. Vogler & Company, Michael Werk, Casimer Werk and Michael Schwartz, Partners, Doing Business under the Firm Name and Style of M. Werk & Company, John H. Windisch, Chas. F. Windisch, William A. Windisch, a Minor; Emma W. Windisch, a Minor; Sophia Windisch, Guardian of said Minors, Wm. A. and Emma W. Windisch; Sophia Windisch, Widow of Conrad Windisch, Deceased; Pauline Schwartz, Formerly Pauline Windisch, now Intermarried with John C. Schwartz, and John C. Schwartz, Her Husband, Plaintiffs,

vs.

ALBERT G. ERKENBRECHER, JULIUS DEXTER, WM. MARMET, a Minor, Aged 19 Years; Ida Marmet, a Minor, Aged 14 Years; Edwin Otto Marmet, a Minor, Aged 12 Years; Lucie Marmet, Guardian of said Minors, Wm., Ida, and Edwin Otto Marmet, and Lucie Marmet, Widow of Florence Marmet, Deceased, Defendants.

Petition.

The plaintiffs say that at the times hereinafter stated the plaintiff the Gerke Brewing Company was, and is now, a corporation
 548 duly organized under the laws of the state of Ohio and doing business in said state; that plaintiffs, Ferdinand Vogler and Otto Stein were, and are now, partners doing business in the state of Ohio under the firm name and style of F. Vogler and Company; that plaintiffs Michael Werk and Casimer Werk and Michael Schwartz, were, and are now, partners doing business in the state of Ohio under the firm name and style of M. Werk and Company. Plaintiffs further say, that subsequent to the agreement of Association hereinafter more particularly described and had January 7th, 1887, Conrad Windisch, late of Hamilton County, O., departed this life on or about the 2nd day of July, 1887, leaving as his heirs at law John U. Windisch, Chas. F. Windisch, Wm. A. Windisch, a minor, Emma W. Windisch, a minor, Pauline Schwartz, children of said Conrad Windisch, and leaving Sophia Windisch as his widow. That said Sophia Windisch is the guardian of said Wm. A. Windisch and Emma W. Windisch, and that said John C. Schwartz is the husband of said Pauline Schwartz. Plaintiffs further say that the defendants, W. Marmet a minor aged 19 years, Ida Marmet aged 14 years and Edwin Otto Marmet a minor aged 12 years, are the children and heirs at law,

and that Lucie Marmet is the widow of Florence Marmet late of Hamilton County deceased and that Lucie Marmet is the guardian of said minor defendants.

Plaintiffs further say, that on or about the 7th day of January, 1887, John Hauck, Robert Allison, A. E. Burkhardt, George Fisher, Lewis Van Antwerp, Christian Moerlin, Gottlieb Muhlhauser, Henry Muhlhauser, Herman Lackman, Larz Anderson, G. A. Frank, J. T. Carew, Charles P. Taft, Alexander McDonald, The Gerke Brewing Company, the firm of F. Vogler & Company, the firm of M. Werk
549 and Company, plaintiffs above named, Conrad Windisch then in life but since deceased and the father and husband of the other of the plaintiffs above particularly described together with Julius Dexter and Albert G. Erkenbrecher, defendants, and Florence Marmet then in life but since deceased, the father and husband of the other defendants as more particularly hereinabove set forth, by an agreement in that behalf and for that purpose duly signed by them, and each of them, the said Gottlieb and Henry Muhlhauser signing the same as G. & H. Muhlhauser, associated themselves together and thereunto severally and mutually covenanted and agreed with each other for the purpose of forming a company to consist of the said parties last above named, being twenty in number, which number should constitute the whole number of shares in said company, the shares to be provided and paid for as provided in said agreement, and the purpose of which company was, by the terms of the said agreement to be the purchase, improvement and sale of certain real estate in Hamilton County, Ohio, and hereinafter more particularly described. That among other things it was provided in said agreement, that three trustees of the number of said subscribers should be elected; that said trustees were authorized to purchase the real estate above referred to and hereinafter mentioned for a price named in said agreement, and upon terms therein provided, and it was also provided in said agreement that said trustees were authorized in purchasing such real estate to take the title thereof to themselves as trustees, and thereupon the said trustees should execute a declaration of trust in favor of the said Association and the members thereof. And it was further provided in said agreement as follows, to-wit: "And upon the death or the resignation of either of said
550 trustees (being the trustees hereinabove mentioned) the subscribers at a meeting which shall be called by the surviving trustees, upon not less than five days' notice thereof in Cincinnati, shall elect by a majority vote a successor to such trustee, and each trustee accepting this trust hereby covenants and agrees that upon his resignation he will, and upon his death his heirs shall, convey to his successor in said trust, all his title to said real estate not then disposed of, to be held subject to the terms of this agreement and the trust hereby provided for." Plaintiff further says that thereafter, pursuant to such agreement, the said Association therein provided for, was duly formed, in all respects as provided by the terms of said agreement, and became, and was and is known as "The Zoological Land Syndicate" and such proceedings were thereafter

duly had in pursuance to said agreement and the terms thereof, as that Julius Dexter, Albert G. Erkenbrecher and Florence Marmet, hereinabove named, were duly appointed and elected as the trustees named in said agreement, and they thereafter severally accepted the said election and the said trust, in all respects as provided in said agreement, a copy of which agreement is hereto attached and made a part hereof, marked "Exhibit B." And thereafter, and under and in pursuance of the said agreement and the power and authority therein granted, the said trustees purchased from John Hauck the property above mentioned and hereinafter more particularly described; and thereupon, on the 31st day of January, 1887, the said John Hauck, together with Catherine Hauck, his wife, executed and delivered in due form to Florence Marmet, Julius Dexter and Albert G. Erkenbrecher, a warranty deed for the fee simple of the following described premises being the same premises hereinbefore and in said agreement of Jan'y 7th, 1887, described, which deed is duly recorded in Book No. 628, p. 181 of the records

551 of deeds of Hamilton County, Ohio, to-wit:

All those certain lots or parcels of land in the village of Avondale, Hamilton County, Ohio, lying and being in Section 15, Township 3, Fractional Range 2, of the Miami Purchase, and described as follows: Beginning in the south line of said Section 15, at the southeast corner of Lot No. 20, on a plat of subdivision made by B. F. Hinman, as recorded in Plat Book 2, page 258, Hamilton County, Ohio, Records; thence north along the east line of said Hinman's subdivision 360 feet; Thence west parallel with the south line of Section 15 600 feet; thence south, parallel to said Hinman's east line 360 feet to the south line of Section 15; thence east on said south line 600 feet to the place of beginning, being parts of lots 10, 19 and 20 on said Hindman's subdivision and containing 4.96/100 acres of land; also beginning at a point in the east line of lot No. 35 of Thomas French's subdivision as recorded in Plat Book 4, page 244 Hamilton County Ohio Records; said point being 104.4/100 feet south of Dexter Avenue measured along the east line of said lot 35; thence north $23^{\circ} 59'$ west along the east line of said French's sub. 465.62 feet to the northeast corner thereof; thence north $88^{\circ} 30'$ west 318.70 feet to a point in the centre of the Carthage pike. Thence along said Pike north $11^{\circ} 45'$ west 258.88 feet, and $38^{\circ} 30'$ 281 feet; north 57° west 115 feet; north $20^{\circ} 35'$ west 108.48 feet to the south line of a tract owned by F. A. Knabe. Thence south $88^{\circ} 30'$ east 650.22 feet thence south $2^{\circ} 06'$ west 80 feet; thence south 40° east, 864.74 feet; thence south 50° west 155 feet; thence south 40° east 25 feet; thence south 50° west

552 300.420ths. feet to the place of beginning, containing 11.93 acres of land and being parts of lots 2, 3, 5, 6, 7, 8, 9, 11, 12, and all of lot 4 on said Hinman's Subdivision. Also beginning in the center of Forest Avenue northeast cor. of lot No. 17 on said Hinman's Sub. Thence west along the center of Forrest Avenue 280 feet more or less to the east line of the right of way of the Spring Grove and Avondale and Cincinnati Railway; thence south eastwardly along the line of the right of way of said railroad 465

feet more or less to the east line of lot No. 17 aforesaid; thence north along said east line 364 feet more or less to the place of beginning, and containing 144 acres of land; also, all that certain lot in section 14 T. 3 F. R. 2 M. P. being lot No. 15 on plat made by heirs of A. McMillan as recorded in plat book No. 1, page 182 Hamilton Co. Ohio records, said lot measuring 490.05 from east to west and 237.60 feet from north to south and containing 2.67 acres of land."

And further, on or about February 3rd, 1887, the Zoological Society of Cincinnati, a corporation duly organized under the laws of the State of Ohio executed and delivered to the said Florence Marmet, Julius Dexter and Albert G. Erkenbrecher its quit-claim deed in due form according to law, of the premises hereinabove described; and thereupon, on or about the 31st day of January, 1887, and pursuant to the provision of the said agreement in that behalf provided in the Articles of Association and as hereinabove set forth, the said trustees, Florence Marmet Julius Dexter and Albert G. Erkenbrecher duly made, executed and delivered their declaration of trust in favor of the Association and the members thereof, 553 a copy of which declaration of trust is hereto attached and made part hereof marked "Exhibit A." And thereupon said trustees entered upon the discharge of their duties as such trustees pursuant to the provisions of said agreement of Association and of said trust as aforesaid and proceeded with the carrying out and discharge of the duties and provisions thereof. And thereafter, on or about the 14th of November, 1887, the said Florence Marmet departed this life intestate and seized in fee simple by reason of the premises, of an undivided one-third of the said real estate, subject to the trust herein set forth, and the provisions thereof, and leaving as his widow and heirs at law the defendants as hereinabove set forth. And thereafter the said Julius Dexter and Albert G. Erkenbrecher duly called a meeting of the subscribers, members of the said Zoological Land Syndicate upon the notice and in all respects as provided by the agreement of association in that behalf, at which meeting held in Cincinnati on Saturday, March 31st, 1888, it was resolved by a unanimous vote duly had, 18 of the members of the said Zoological land Syndicate being present and voting in the affirmative, that John Hauck should be and he was then and there elected as successor of the said Florence Marmet as trustee under the articles of association and trust aforesaid; and thereafter said John Hauck duly accepted his said election and the said trust.

Plaintiffs further say, for the purpose of carrying out the object of the said Association and perfecting and securing the title and enjoyment of the property owned, hereinbefore described, and of executing the said trust, it is necessary to transfer and convey and secure to said John Hauck all the right, title and interest of the said Florence Marmet deceased in and to said real estate held by him as aforesaid subject to the said trust, clear and free from 554 all claim, right or title, of or in the said defendants Wm. Marmet, Ida Marmet, Edwin Otto Marmet and Lucie Marmet,

children, widow and heirs at law of the said Florence Marmet, and to quiet the said title against the same.

Wherefore plaintiffs pray that the said defendants, Wm. Marmet, Ida Marmet, Edwin Ottoe Marmet and Lucie Marmet, may be served with *procedd* herein according to law, and that they may be required to answer to this petition; that upon final hearing herein such order or decree shall be entered cutting off all right, title or claim of, or in the said defendants Wm. Marmet, Ida Marmet, Edwin Otto Marmet and Lucie Marmet, in or to the said real estate; that the said Florence Marmet may be decreed to have held title to said real estate as trustee, under, and subject to the terms of the trust, in all respects as above set forth, and that such title as he had, as such trustee, may be decreed to be conveyed and transferred and vested in the said John Hauck subject to the terms of the said trust and said agreement, and for such other order or decree as may be necessary, equitable or proper in the premises.

(Signed)

KITTREDGE & WILBY,
Att'ys for Plaintiffs.

STATE OF OHIO,

Hamilton County, ss:

Robert Allison being first duly sworn says that he is one of the plaintiffs in the foregoing petition named and that the matters and things therein contained are true as he verily believes.

(Signed)

ROBERT ALLISON.

555 Sworn to before me and in my presence subscribed this
18th of April, 1888.

(Signed)

RUFUS S. SIMMONS,
Notary Public, Ham. Co., Ohio.

40¢ due Notary.

"EXHIBIT A."

Declaration of Trust.

Whereas, by two deeds in writing, one of even date herewith, from John Hauck and wife and one from the Zoological Association of Cincinnati, dated February 3rd, 1887, certain real estate in Hamilton County, comprising in the aggregate twenty-one and 33/100 acres, adjoining the Zoological Garden in Hamilton County, Ohio, is conveyed to Florence Marmet, Julius Dexter and Albert G. Erkenbrecher, their heirs and assigns forever;

Now, therefore, this declaration witnesseth:

That the consideration of said conveyance has been paid by the said Florence Marmet, Julius Dexter and Albert G. Erkenbrecher, as Trustees for the Association of individuals known as the Zoological Land Syndicate, being twenty in number, as provided in the agreement of association signed by the said parties bearing date January 7, 1887.

And the said Florence Marmet, Julius Dexter and Albert G.

Erkenbrecher hereby declare that they have received the said conveyance and the title of the premises therein described, as Trustees in trust, for the sole use and benefit of the said Association, 556 The Zoological Land Syndicate, and the members thereof, for the purpose and to be held in the manner provided in said agreement of Association and to be accounted for to the said Association and its members in accordance with the terms of said Agreement for their Association and for the purchase of said property.

Witness our hands and seals this 31st day of January, 1887.

(Signed)

FLORENCE MARMET.

JULIUS DEXTER.

ALB. G. ERKENBRECHER.

"EXHIBIT B."

This agreement made between the undersigned witnesseth:

That we the subscribers do severally covenant and agree each with the other, in consideration of the mutual promises to take the number of shares of five thousand dollars each set opposite to our respective names, in a company to be formed for the purpose hereinafter named, and we severally promise to pay the said sum of five thousand dollars for each share by us subscribed for to the trustees for said company at the time and as hereinafter provided.

Second. The said company shall consist of the subscribers and its formation shall be consummated upon the subscription for twenty shares, which shall constitute the whole number of shares in said company, and upon the subscription being completed a written notice shall be given by any two of the subscribers to the remainder of said subscribers, that said subscription is complete and shall 557 fix a time and place within five days from the date of said notice of a meeting at which the said subscribers shall elect three trustees, one of whom shall also be designated as the president and one of whom as the vice president and one of them the treasurer of said company; and the purpose of said company is the purchase improvement and sale of the following described real estate, to-wit:

All those three certain lots or parcels of land, in the village of Avondale, Hamilton County, Ohio, lying and being in sect. 15, Township 3. Fractional Range 2, of the Miami Purchase, and described as follows: Beginning in the south line of said section 15, at the s. e. cor. of lot No. 20, on a plat of subdivision, made by B. P. Hinman, as recorded in P. B. 2, p. 258 // Hamilton County, Ohio, Records; Thence north along the east line of said Hinman's subdivision, 360 feet; thence west, parallel with the south line of Section 15, 600 feet. Thence south parallel to said Hinman's east line 360 feet to the S. line of sect. 15; thence east on said S. line 600 ft. to the place of beginning, being parts of lots 10, 19 and 20 on said Hinman's subdivision and containing $4 \frac{96}{100}$ acres of land, also beginning at a point in the east line of lot No. 35 of Thomas French's subdivision as recorded in plat book 4, p. 244, Hamilton County O. Records, said point being $104 \frac{4}{100}$ ft. south

of Dexter Avenue measured along the east line of said lot 35, thence N. $23^{\circ} 59'$ W. along the east line of said French's subdivision 465.62 ft. to the N. E. cor. thereof; thence N. $88^{\circ} 30'$ W. 318.70 ft. to a point in the centre of the Carthage pike. Thence along said Pike N. $11^{\circ} 45'$ W. 258.88 ft. N. $38^{\circ} 30'$ W. 281 ft.; N. 57° W. 115 ft.

N. $20^{\circ} 35'$ W. 108.488 ft. to the south line of a tract owned
 558 by F. A. Knabe, thence S. $88^{\circ} 30'$ E. 100.22 ft. thence S. $2^{\circ} 58'$ W. 80 ft. thence south 40° E. 864.74 ft. thence S. 50° W. 155 ft. thence S. 40° E. 25 ft. thence S. 50° W. 300.42 ft. to the place of beginning, containing 11.93 acres of land and being parts of lots 2, 3, 5, 6, 7, 8, 9, 11 and 12 and all of lot 4 on said Hinman's Subdivision. Also beginning in the center of Forrest Avenue, N. E. Corner of lot No. 17 on said Hinman's Subdivision, thence W. along the center of Forrest Avenue 280 ft. more or less to the east line of the right of way of the Spring Grove and Avondale and Cincinnati Railway. Thence Southeastwardly along the line of the right of way of said Railroad 465 ft. more or less to the east line of lot No. 17 aforesaid; thence north along said east line 364 ft. more or less to the place of beginning and containing 1.44 acres of land; also all that certain lot in Sect. 14, T. 3, F. R. 2, M. P., being lot No. 15 on plat made by heirs of A. McMillan as recorded in Plat Book No. 1, p. 182 Hamilton County Ohio Records, said block measuring 490.05 ft. from east to west and 237.60 ft. from north to south, and containing 2.67 acres of land. And the subdivision and improvement thereof and the sale of the same in lots for the benefit of the company. And the said Trustees are and shall be authorized to purchase the said real estate at the price of Ninety Thousand Dollars, in accordance with the option given to Florence Marmet and his associates by the Zoological Society of Cincinnati, dated Jan'y 7th, 1887, to be paid for at such time and upon such terms as may be agreed upon by the said trustees in behalf of the association; and the subscribers hereto hereby promise and agree to pay in cash at once to the trustee selected as treasurer, 30 per cent of the amounts
 559 of their several subscriptions, and the remainder of said subscriptions shall be payable at such times as the said trustees or a majority of them may decide to be necessary by equal assessments upon each share of Five Thousand Dollars so subscribed and they shall fix the time when the assessments by them shall become due, and thereafter they shall bear six per cent interest until paid.

Third. The said trustees are hereby authorized in purchasing said real estate, to take the title to themselves as trustees and shall thereupon execute a declaration of trust in favor of the association and the members thereof in proportion to the number of shares subscribed for by them. And the said Trustees are thereupon authorized and required to cause a subdivision of said property to be made and the streets in said subdivision to be graded and improved, and such other improvements to fit such property to be sold into lots as may in their judgment be necessary for that purpose. And the said Trustees are hereby authorized to collect the amount of said several subscriptions as hereinbefore provided and to apply it in payment for

said property and for the expenses of said improvements and to the discharge of any indebtedness by them contracted as such trustees in making said purchase and improvements in behalf of the Association. And the said Trustees are hereby authorized to execute and deliver a mortgage in due form of law upon the said real estate to secure the payment of any part of the purchase money for said real estate at such time as may be provided in the terms of the purchase to be agreed to by them. And the said trustees are authorized to sell and convey upon such terms as they may deem best, all or any part of the lots into which said real estate is subdivided by good and sufficient deeds of general warranty; such sales to be made

560 either at public or private sales, as such trustees or a majority of them may agree; and upon the death or the resignation of either of them such trustees, the subscribers at a meeting which shall be called by the surviving trustees upon not less than five days notice thereof in Cincinnati shall elect by a majority vote a successor to such trustee and each trustee accepting this trust hereby covenants and agrees that upon his resignation he will, and upon his death his heirs shall, convey to his successor in said trust all his title to said real estate not then disposed of, to be held subject to the terms of this agreement and the trust hereby provided for. And it is further hereby provided and agreed by each trustee accepting said trust that he shall receive no compensation for his personal services to be rendered in administering said trust except such as he derives in common with the other share-holders by reason of his ownership and interest in this Association. But all the expenses of administering said trust other than any personal compensation the trustee shall be paid for out of said trust fund by the treasurer and upon the order of said trustees or any two of them.

Fourth. The trustees shall call meetings of the share holders once every six months and as much oftener as they may deem necessary, at such time and place in Cincinnati as they may designate in a notice to be served upon each of the share-holders and upon a failure of the trustees to call a meeting every six months, and five of the shareholders may call such meeting. And a majority of the shareholders present at a meeting called as herein provided shall have authority to direct any action or step to be taken by said trustees in administering said trust which they may deem best, and for the interests of the association; and the said trustees shall be bound to and hereby agree to take such action in the execution of said trust as they may be required to by said vote of

561 the majority of the shareholders; and at each semi-annual meeting of said shareholders the said trustees shall render an account of the receipts and disbursements by them and of all other action taken by them in the administration of said trust.

Fifth. Purchasers of real estate at public or private sale from said trustees shall not be required to see to the application of the purchase money and payments by them to the treasurer in discharge of any indebtedness shall be binding upon all the members of the association.

Sixth. The majority of the shareholders at any meeting called

as hereinbefore provided may at any time determine to wind up the business and provide the mode of disposing of any property that may then remain, and generally of liquidating the affairs of the association.

562	No. shares.	Amt.
1. John Hauck.....	1	5,000.00
2. Florence Marmet.....	1	5,000.00
3. The Yerke Brewing Co.....	1	5,000.00
4. R. Allison.....	1	5,000.00
5. A. E. Burkhardt.....	1	5,000.00
6. George Fisher.....	1	5,000.00
7. Alb. Erkenbrecher.....	1	5,000.00
8. L. Van Antwerp.....	1	5,000.00
9. Christian Moerlin, per J.....	1	5,000.00
10. Conrad Windisch, per John.....	1	5,000.00
11. G. & H. Muhlhauser.....	1	5,000.00
12. H. Lackman, per B. B.....	1	5,000.00
13. M. Werk & Co.....	1	5,000.00
14. F. Vogler & Co.....	1	5,000.00
15. Julius Dexter.....	1	5,000.00
16. Larz Anderson.....	1	5,000.00
17. G. A. Frank.....	1	5,000.00
18. J. T. Carew.....	1	5,000.00
19. Chas. P. Taft.....	1	5,000.00
20. Alex. McDonald.....	1	5,000.00

563 The said document bears the following endorsement:

No. 80816. Ham. Co. Common Pleas Court. Robert Allison et als., Plaintiffs, vs. Albert G. Erkenbrecher et als., Defendants. Petition. To Clerk: Issue summons for defts. Indorsed Action for Relief. Specific conveyance of real estate and Declaration of Trust. (5350.) Filed Apr. 18, 1888. Daniel J. Dalton, Clerk. Kittredge & Wilby, Att'ys for Pl'ffs.

564 "EXHIBIT P-1."

Hamilton Common Pleas.

No. 80816.

ROBERT ALLISON et al., Plaintiffs,
against

ALBERT G. ERKENBRECHER, JULIUS DEXTER, et al., Defendants.

Answer of Lucie Marmet, Widow.

Now comes Lucie Marmet, widow of Florence Marmet, deceased and for answer to plaintiffs' petition admits all the allegations therein contained and concurs in the prayer thereof.

VON SEGGERN, PHARES & DEWALD,

Att'ys for Lucie Marmet.

STATE OF OHIO,

County of Hamilton, ss:

Lucie Marmet defendant above named being first duly sworn says the statements contained in her foregoing answer are true as she verily believes.

(Signature)

MRS. LUCIE MARMET.

Sworn to before me and subscribed in my presence this 29th day of May, A. D. 1888.

(Signature)

GEORGE H. VON SEGGERN,
Notary Public, Hamilton County, Ohio.

[SEAL.]

565 The following endorsement appears on the foregoing document:

80816. P-1. Ham. Com. Pleas. Robert Allison et al., Plaintiffs, against Albert G. Erkenbrecher et al., Defendants. Answer of Lucie Marmet, widow. 250. Filed May 29, 1888. Daniel J. Dalton, Clerk. Von Seggern, Phares & Dewald, Att'ys for Lucie Marmet. Clerk's Fees 05¢. Paid by Von Seggern, P. & D. May 29/88. Copy of p'd by Kittredge & W. 25¢.

566

EXHIBIT "P-2."

Common Pleas Court, Ham. Co., Ohio.

80816.

ROBERT ALLISON et al., Plaintiffs,

vs.

ALBERT G. ERKENBRECHER et al., Defendants.

Answer of William Marmet, Ida Marmet, and Edwin Otto Marmet by Rufus S. Simmons, Guardian ad Litem.

Now comes the defendants, William Marmet, Ida Marmet and Edwin Otto Marmet, by Rufus S. Simmons their guardian ad litem and for answer to the plaintiffs' petition herein deny each and every allegation therein contained, and they say that they are of tender years and ask that the court protect their rights and grant to them such relief as to the Court shall seem just and equitable.

WM. MARMET,

IDA, & EDWIN OTTO MARMET,

By RUFUS S. SIMMONS,

Guardian ad Litem.

Guardian ad litem fees \$10.00.

567 The following endorsement appears on the foregoing document:

No. 80816. P-2. Ham. Co. Com. Pleas Ct. Robert Allison et als., Pl'ffs., vs. Albert G. Erkenbrecher et als., Defts. Answer. Wm.

Marmet, Ida Marmet, and Edwin Otto Marmet, by Gdn. ad litem.
 Filed May 22, 1888. Daniel J. Dalton, Clerk. 250. Clerk's fees
 .05. Paid by R. S. Simmons.

568

"EXHIBIT P-3."

Hamilton Common Pleas.

No. 80816.

ROBERT ALLISON et al., Plaintiffs,
 against

ALBERT G. ERKENBRECHER, JULIUS DEXTER, et al., Defendants.

Answer of Lucie Marmet, Widow.

Now comes Lucie Marmet Widow of Florence Marmet deceased
 and for answer to plaintiff's petition admits all the allegations
 therein contained and concurs in the prayer thereof.

VON SEGGERN, PHARES & DEWALD,
Att'ys for Lucie Marmet.

STATE OF OHIO,

County of Hamilton, ss:

Lucie Marmet defendant above named being first duly sworn says
 the statements contained in her foregoing answer are true as she
 verily believes.

(Signature)

MRS. LUCIE MARMET.

Sworn to before me and subscribed in my presence this 29th day
 of May, A. D. 1888.

(Signature)

GEORGE H. VON SEGGERN,

[SEAL.]

Notary Public, Hamilton County, Ohio.

569 The following endorsement appears on the foregoing
 document:

80816. Ham. Com. Pleas. Robert Allison et al., Plaintiffs,
 against Albert G. Erkenbrecher et al., Defendants. Answer of Lucie
 Marmet, Widow. 250. Filed May 29, 1888. Daniel J. Dalton,
 Clerk. Von Seggern, Phares & Dewald, Att'ys for Lucie Marmet.
 Clerk's Fees .05¢. Paid by Von Seggern, P. & D. May 29/88.
 Copy of p'd by Kittredge & W. 25¢.

570

EXHIBIT "P-4."

Common Pleas Court, Ham. Co., Ohio.

80816.

ROBERT ALLISON et al., Plaintiffs,

vs.

ALBERT G. ERKENBRECHER et al., Defendants.

*Answer of William Marmet, Ida Marmet, and Edwin Otto Marmet,
by Rufus S. Simmons, Guardian ad Litem.*

Now comes the defendants, William Marmet, Ida Marmet and Edwin Otto Marmet, by Rufus S. Simmons their guardian ad litem and for answer to the plaintiffs' petition herein deny each and every allegation therein contained, and they say that they are of tender years and ask that the court protect their rights and grant to them such relief as to the Court shall seem just and equitable.

WM. MARMET,
IDA, & EDWIN OTTO MARMET,
By RUFUS S. SIMMONS,
Guardian ad Litem.

Guardian ad litem fees \$10.00.

571 The following endorsement appears on the foregoing document:

No. 80816. Ham. Co. Com. Pleas Ct. Robert Allison et als., Pl'ffs, vs. Albert G. Erkenbrecher et als., Def'ts. Answer. Wm. Marmet, Ida Marmet, and Edwin Otto Marmet, by Gdn. ad litem. Filed May 22, 1888. Daniel J. Dalton, Clerk. 250. Clerk's Fees .05. Paid by R. S. Simmons.

572

EXHIBIT P-5.

Hamilton Common Pleas Court.

No. 80816.

ROBERT ALLISON et als., Plaintiffs,

vs.

ALBERT G. ERKENBRECHER and JULIUS DEXTER et als., Defendants.

Answer of Albert G. Erkenbrecher and Julius Dexter.

Now come Albert G. Erkenbrecher and Julius Dexter, two of the defendants above named, and, waiving the issuing and service of summons herein, severally enter their appearance in this cause, and,

admitting all the allegations in plaintiffs' petition, concur in the prayer thereof.

(Signature)

KITTREDGE & WILBY,
For Julius Dexter & Alb. G. Erkenbrecher.

STATE OF OHIO,
Hamilton County, ss:

Albert G. Erkenbrecher and Julius Dexter, defendants above named, being severally sworn say, that the statements in the foregoing answer are true.

(Signature)

ALB. G. ERKENBRECHER.

(Signature)

JULIUS DEXTER.

Sworn to before me and subscribed in my presence this 28th day of April, 1888.

(Signature)

RUFUS S. SIMMONS,
Notary Public, Hamilton Co., O.

[SEAL.]

40¢ due Notary.

573 The following endorsement appears on the foregoing document: 80816. P.-5. Com. Pleas Court. Robert Allison et al. vs. Albert G. Erkenbrecher et al. Filed Apr. 28, 1888. Daniel J. Dalton, Clerk. Ans. Julius Dexter and Albert G. Erkenbrecher. 250. Kittredge & Wilby, Att'ys. Clerk's fees .05¢ Paid by Kittredge & W.

574

EXHIBIT P-6.

Hamilton Common Pleas Court.

No. 80816.

ROBERT ALLISON et als., Plaintiffs,

vs.

ALBERT G. ERKENBRECHER et als., Defendants.

Entry Appointing Guardian ad Litem.

It appearing to the Court that William Marmet, Ida Marmet and Edwin Otto Marmet, minor defendants, have each of them been duly served with summons herein, and that said minors William Marmet and Ida Marmet are each of the age of fourteen years or over, and have not applied for the appointment of a guardian ad litem, although more than twenty days have elapsed since the return of the summons served upon each of them, on the application of the plaintiffs, it is ordered that Rufus S. Simmons be, and he is hereby, appointed guardian ad litem for said minor defendants, William Marmet, Ida Marmet and Edwin Otto Marmet; and thereupon came the said Rufus S. Simmons and in open court accepted said appointment as guardian ad litem.

575 The following endorsement appears on the foregoing document: No. 80816. P-6. Hamilton Com. Pleas Ct. Robert Allison et als., pl't'ffs, vs. Albert G. Erkenbrecher et als. d'f'ts. Order appointing Guardian ad litem. Enter. C. D. R. May 21/88. Ent. Min. 294.

576

EXHIBIT P-7.

THE STATE OF OHIO,
Hamilton County, ss:

To the Sheriff of the County of Hamilton:

You are commanded to notify Albert G. Erkenbrecher, Julius Dexter, Wm. Marmet a minor aged 19 years, Ida Marmet a minor aged 14 years, Edwin Otto Marmet a minor aged 12 years, Lucie Marmet Guardian of said minors, Wm., Ida and Edwin Otto Marmet, and Lucie Marmet widow of Florence Marmet deceased, defendants, that they have been sued by Robert Allison, John Hauck, A. E. Burkhardt, George Fisher, Lewis Van Antwerp, Christian Moerlein, Gottlieb Muhlhauser, Henry Muhlhauser, Hermann Lackmann, Larz Anderson, G. A. Frank, J. T. Carew, Charles P. Taft, Alexander McDonald, The Gerke Brewing Company a Corporation under laws of Ohio, Ferdinand Vogler and Otto Stein partners doing business under the firm name & style of F. Vogler & Company, Michael Werk, Casimer Werk and Michael Schwartz, partners doing business under firm name of M. Werke & Company, John M. Windisch, Chas. F. Windisch, William A. Windisch, Emma W. Windisch, a minor, Sophia Windisch, Guardian of said minors Wm. A. and Emma W. Windisch, Sophia Windisch widow of Conrad Windisch, dec., Pauline Schwartz formerline Pauline Windisch now intermarried with John C. Schwartz and John C. Schwartz her husband, Plaintiffs, in the Court of Common Pleas of Hamilton County, and that unless they answer by the 19th day of May A. D. 1888 the petition of the said Plaintiffs against them filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

577 You will make due return of this summons on the 30th day of April A. D. 1888.

Witness my hand and the Seal of the said Court, at Cincinnati, this 18th day of April one thousand eight hundred and eighty eight.

(Signed)

DANIEL J. DALTON,

*Clerk of the Court of Common Pleas,**Hamilton County, Ohio,*

[SEAL.] (Signed) By W. H. SARGENT, Deputy.

578 The following endorsement appears upon the foregoing document: No. 80816. P. 7. Hamilton Common Pleas. Robert Allison et al., Plaintiffs, vs. Albert G. Erkenbrecher et als., Defendants. Summons in Action for Relief. Specific conveyance of real estate & Declaration of Trust. Filed Apr. 30, 1888. Daniel J. Dalton, Clerk. To 30 day of April, 1888. Kittredge & Wilby, Attorney-. 18-30-27. 5.60 H.

Sheriff'- Fees.

Service and Return	1.60
Copies	3.20
Mileage80
	<hr/>
	\$5.60

CINCINNATI, April 27", 1888.

Served the within named defendants, Ida Marmet a minor aged 14 years, Lucie Marmet as Guardian and Lucie Marmet as Widow by delivering to each personally a true copy of this writ with all the endorsements thereon, also served Julius Dexter and Wm. Marmet (a minor) by leaving a true copy of this writ with all the endorsements thereon at each usual places of residence, also served Edwin Otto Marmet a minor, aged 12 years by delivering to him and also to Lucie Marmet the Guardian of said minor a true copy of this writ with all the endorsements thereon, other defendant not found.

(Signed)

LEO W. SCHOTT, *Sheriff*,
By GEO. W. DRAPER, *Dep.*

Rec'd Apr. 18, 1888.

LEO. SCHOTT, *Sheriff*.

579

EXHIBIT P-8.

Hamilton County Common Pleas Court.

ROBERT ALLISON, JOHN HAUCK, A. E. BURKHARDT, GEORGE Fisher, Lewis Van Antwerp, Christian Moerlein, Gottlieb Muhlhauser, Henry Muhlhauser, Herman Lackmann, Larz Anderson, G. A. Frank, J. T. Carew, Charles P. Taft, Alexander McDonald, The Gerke Brewing Company, a Corporation under the Laws of the State of Ohio; Frederick Vogeler and Otto Stein, Partners Doing Business under the Firm Name and Style of F. Vogler & Company; Michael Werk, Cassimer Werk, and Michael Schwartz, Partners Doing Business under the Firm Name and Style of M. Werk & Company; John M. Windisch, Chas. F. Windisch, William A. Windisch, a Minor; Emma W. Windisch, a Minor; Sophia Windisch, Guardian of said Minors; William A. and Emma W. Windisch, Sophia Windisch, Widow of Conrad Windisch, Deceased; Pauline Schwartz, Formerly Pauline Windisch, now Intermarried with John C. Schwartz, and John C. Schwartz, Her Husband, Plaintiffs,

vs.

ALBERT G. ERKENBRECHER, JULIUS DEXTER, WILLIAM MARMET, a Minor, Aged 19 years; Ida Marmet, a Minor, Aged 14 Years; Edwin Otto Marmet, a Minor, Aged 12 Years; Lucie Marmet, Guardian of said Minors, William, Ida, and Edwin Otto Marmet, and Lucie Marmet, Widow of Florence Marmet, Deceased, Defendants.

580

Decree.

This cause came on to be heard upon the petition, the answer of Julius Dexter and Albert G. Erkenbrecher, defendants, the answer

of Lucie Marmet widow of Florence Marmet deceased, the answer of William, Ida, and Edwin Otto Marmet minor defendants by Rufus S. Simons their guardian ad litem, and the proofs and exhibits, and was submitted to the Court, and the Court upon consideration finds,

That all and each of the defendants to the above-entitled cause and above named, have filed their answers herein, or have been duly served with summons in this cause and are in default for answer or demurrer.

That the defendants Julius Dexter and Albert G. Erkenbrecher have entered their appearance and have by their answer admitted the allegations in the petition to be true.

That the defendant Lucie Marmet widow of Florence Marmet deceased has by her answer admitted the allegation of the petition to be true.

That the defendant Lucie Marmet guardian of William, Ida and Edwin Otto Marmet has been duly served with summons herein, and is in default for answer or demur- to the petition, and has thereby confessed the allegations of the petition to be true.

That the defendants William Ida and Edwin Otto Marmet minors, have each of them been duly served with process herein, are duly before the Court; have duly had a guardian ad litem appointed herein, and by said guardian ad litem have duly filed their answer herein.

581 And the Court finds that the allegations of the petition and each and every of them, are true as in the said petition herein set forth and the same are hereby referred to and made part of and incorporated into this decree as fully as if they were here written.

And the Court finds that, on or about the 7th day of January 1887, John Hauck, Robert Allison, A. E. Burkhardt, George Fisher, Lewis Van Antwerp, Christian Moerlein, Gottlieb Muhlhauser, Henry Muhlhauser, Herman Lackmann, Larz Anderson, G. A. Frank, J. T. Carew, Charles P. Taft, Alexander McDonald, The Gerke Brewing Company, the firm of F. Vogeler & Company, the firm of M. Werk & Company, Conrad Windisch, Julius Dexter, Albert G. Erkenbrecher, and Florence Marmet, entered into and executed the agreement in writing, a copy of which is attached to the petition and marked Exhibit "B".—That thereafter and pursuant to the provisions of said agreement or articles of association an association was duly formed which was and is known as "The Zoological Land Syndicate", and thereafter pursuant to the provisions of said agreement in that behalf, Julius Dexter, Albert G. Erkenbrecher, and Florence Marmet (since deceased) were appointed and elected as the trustees named in said agreement, and having accepted said appointment and election, they thereafter under and in pursuance of the said agreement and the power and authority therein granted, purchased the property described in the petition, being Real Estate in the Village of Avondale, Hamilton County, Ohio; and on the 31st day of January 1887, a warranty deed for the same was duly executed to and delivered to said Florence Marmet (since deceased

582 but then in life), Julius Dexter and Albert G. Erkenbrecher, which deed is duly recorded in book No. 628, p. 181, of the records of Hamilton County, Ohio, but for a more particular description of the said Real Estate, reference is made to the petition herein.

That on or about Feb'y 3d, 1887, The Zoological Society of Cincinnati, a corporation under the laws of Ohio, executed and delivered to said Florence Marmet (then in life, but since deceased), Julius Dexter, and Albert G. Erkenbrecher, its quit-claim deed, of the premises; and that on or about January 31, 1887, and pursuant to the provision of the agreement in that behalf provided in the said articles of association attached to the petition and marked Exhibit "B", the said Trustees, Florence Marmet (then in life, but now deceased) Julius Dexter and Albert G. Erkenbrecher, duly made, signed, executed and delivered their declaration of trust in favor of the said Association and the members thereof, of and concerning the said Real Estate, a copy of which declaration of trust is attached to the petition herein, and marked Exhibit "A".

And thereupon said trustees entered upon the discharge of their duties as trustees pursuant to the provisions of said articles of association and their declaration of trust aforesaid.

And afterwards, on or about 14th day of Nov., 1887, the said Florence Marmet departed this life, intestate and seized in fee simple, subject to the said trust, of one undivided third of said real estate, and leaving Lucie Marmet his widow, and William, Ida and Edwin Otto Marmet, all defendants hereto, as his heirs at law.

583 That thereafter pursuant to and in all respects in accordance with the terms and provisions of the said articles and agreement of association in that behalf, and for the purpose of selecting and appointing as therein provided a successor to said Florence Marmet as Trustee, the said Albert G. Erkenbrecher and Julius Dexter duly called a meeting upon five days notice thereof, of the members of the said Zoological Land Syndicate in Cincinnati on Saturday March 31, 1888, at which meeting it was duly resolved by a unanimous vote, eighteen of the members of the said Syndicate being present and voting in the affirmative, that John Hauck, who is one of the plaintiffs herein, should be, and he was, then and there elected as successor of and to the said Florence Marmet, deceased as Trustee under the said articles of association and the terms of said Trust aforesaid; and thereafter said John Hauck duly accepted his said election and the said Trust.

And the Court finds that the title of said Florence Marmet deceased in and to said Real Estate was as trustee and not otherwise, and subject to the terms of said declaration of Trust and said articles of association and that all the right, title and interest of the said Florence Marmet, deceased in and to said Real Estate, should be transferred, conveyed, decreed and secured to said John Hauck as such Trustee, and subject to the said trust, clear and free, from all claim right or title of or in the said defendants William Marmet, Ida Marmet, Edwin Otto Marmet and Lucie Marmet, widow and heirs at law of the said Florence Marmet deceased.

It is therefore adjudged, ordered and decreed by the Court, that the said undivided one third of said Real Estate in the petition herein described, which was as hereinabove found, held by the late Florence Marmet in his life time in fee simple, but
 584 in trust for certain purposes and trusts set forth in the agreement of association marked Exhibit "B" and the declaration of trust marked Exhibit "A" attached to the petition in this case, and all the title to said Real Estate that was held by said Florence Marmet, deceased, in the manner and subject to the trust aforesaid, be transferred to and vested in said John Hauck and his heirs and assigns forever subject to the terms of said trust and said agreement of association.

It is accordingly ordered, adjudged and decreed that within — (5) days from the date of this decree, the said defendant, Lucie Marmet as the widow of said Florence Marmet deceased, and the defendants, William, Ida and Edwin Otto Marmet, and said Lucie Marmet, as guardian of said William, Ida and Edwin Otto, convey by deed or deeds in due form the premises in the petition described and herein refer-
 ed to, the said William, Ida and Edwin Otto Marmet, conveying by Lucie Marmet their guardian, to the said John Hauck, his heirs and assigns forever, and in default thereof, it is ordered that this decree have the same force and operation and effect, and be in all respects as available as such deed or deeds of conveyance would be to convey the said undivided interest in said Real Estate to the said John Hauck and his heirs and assigns forever.

And it is further ordered, adjudged and decreed, that the said defendants William, Ida, Edwin Otto and Lucie Marmet or any one claiming through or under them, be, and they are hereby, forever enjoined from making or setting up any claim to said Real Estate or any part thereof, inconsistent with the title and ownership of said John Hauck as Trustee as aforesaid, or inconsistent
 585 with the enjoyment and use thereof for the uses and purposes of the said association as set forth in the said agreement of association or from interfering with said association or its members, or its trustees or either of them, in such enjoyment and use of said premises, or from setting up any claim thereto not in accordance with the findings of this decree. And it is ordered that the plaintiffs pay the costs of this cause, taxed at —.

586

"EXHIBIT Q."

The Ohio Traction Company,
 General Offices, Traction Building.

CINCINNATI, OHIO, Apr. 14, 1914.

Mr. Walter M. Schoenle, City Solicitor, Cincinnati, Ohio.

DEAR SIR: I beg to acknowledge receipt of your letter of April 13th enclosing copy of ordinance submitted by you to Council Committee with reference to fares in the Millcreek Valley, for which I thank you.

Yours very truly,

WALTER A. DRAPER,
Vice-President.

587 United States District Court, Southern District of Ohio,
Western Division.

In Equity. No. 35.

THE CINCINNATI AND HAMILTON TRACTION COMPANY, a Corporation,
and The Ohio Traction Company, a Corporation, Plaintiffs,

versus

THE CITY OF CINCINNATI, a Municipal Corporation, Defendant.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

I, B. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify that Complainants' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, and Defendant's Exhibits A, B, C1, C2, D, E, F, G, H, I, J, K, L, M, N, O, P1, P2, P3, P4, P5, P6, P7, P8, and Q, bound together in this volume, are the principal exhibits referred to in the order of this Court of August 4, 1914, and are herewith sent up to the Supreme Court of the United States in pursuance of said order and in lieu of printed copies of said exhibits.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 17th day of August, A. D., 1914.

[Seal United States District Court, Southern Dis. of Ohio.]—

B. E. DILLEY, *Clerk,*

By F. A. HIGHT, *Deputy.*

588 In the Supreme Court of the United States, October Term,
1914.

No. 600.

THE CITY OF CINCINNATI, a Municipal Corporation, Appellant.

vs.

THE CINCINNATI & HAMILTON TRACTION COMPANY, a Corporation,
and THE OHIO TRACTION COMPANY, a Corporation, Appellees.

Affidavit of Maurice Brauer.

STATE OF OHIO,
County of Hamilton, ss:

Maurice Brauer, being first duly sworn, deposes and says that he served a true copy of the "Statement of errors on which appellant proposes to rely and all the parts of the record deemed necessary for the consideration thereof" on the appellees and their counsel by delivering a true copy thereof at the offices of each of said counsel,

to-wit: Lawrence Maxwell, Alfred G. Cassatt, George H. Warrington and Ellis G. Kinkead, on November 7, 1914.

And further deponent saith not.

MAURICE BRAUER.

██████████

Sworn to before me and subscribed in my presence this 10th day of November, A. D. 1914.

[Notarial Seal Hamilton County, Ohio.]

BENJAMIN H. BUSMANN,

Notary Public in and for Hamilton County, Ohio.

██████████

589 In the Supreme Court of the United States, October Term, 1914.

No. 600.

THE CITY OF CINCINNATI, a Municipal Corporation, Appellant,
vs.

THE CINCINNATI & HAMILTON TRACTION COMPANY, a Corporation,
and THE OHIO TRACTION COMPANY, a Corporation, Appellees.

Statement of Errors on Which Appellant Proposes to Rely and All the Parts of the Record Deemed Necessary for the Consideration Thereof.

The City of Cincinnati, appellant herein, respectfully shows that it proposes to rely on all the assignments of error heretofore filed herein in the court below, which assignments of error are hereto attached, made part hereof and marked "Exhibit A." Appellant further says that it deems necessary for the consideration of said errors, that the following portions of the record below named be printed, it being intended that the omissions shall be of duplications only. The parts to be printed are numbered below; the parts to be omitted from the exhibits are lettered.

Transcript page.

1. Bill of Complaint and Exhibits thereto.....	1
2. Motion for preliminary injunction.....	16
3. Answer with all Exhibits thereto.....	17
4. Order of Judge Sater granting restraining order.....	49 & 51
5. Marshal's return on restraining order.....	53
6. Opinion	54
7. Assignment of errors.....	75
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8. Decree	80
9. Bond on Appeal.....	83
10. Citation	85
11. Marshal's return on citation.....	86
12. Entry ordering evidence reproduced in full.....	87

13. Transcript of evidence.....88 to 117
14. Order transmitting original exhibits..... 124
15. Præcipe for record..... 125
16. Clerk's certificate 127
17. Citation and Service..... 127
18. Exhibits 1 to 6, inclusive.....131 to 171
19. Exhibit 7, record before the Supreme Court of Ohio in
Case No. 6737, the Village of Carthage, et al. vs. The
Mill Creek Valley Street Railroad Company..... 174
Omitting the following parts thereof:
(a) Bill of Exceptions pp. 21 to 45 substituting "Bill
of exceptions, not offered in evidence."
(b) Exhibit 1A, p. 45 thereof, substituting the state-
ment "Articles of Incorporation of C. H. M. & D. street
R. Co., same as Exhibit 1 in the case at bar, p. —
hereof."
(c) Exhibit 7 A, pp. 54 to 62 thereof, substituting
the statement "Being the bill of complaint and answer
in the case of The Louisville Trust Co. v. City of Cincin-
nati No. 4797 in Equity, being abbreviated statements
of Exhibits 2 and 22 to Exhibit 8 herein p. — hereof."
Do not omit the decree on pp. 62 and 63 of Exhibit
7 in the case at bar.
20. Exhibit 8, Record before the Supreme Court of Ohio in
Case No. 8981, the State of Ohio ex rel. Hoffheimer,
etc., vs. The Millcreek Valley Street Railroad Co..... 299
omitting the following parts thereof:
(d) Exhibit 1, p. 25 thereof, substituting the state-
ment "Articles of Incorporation of C. H. M. & D. Street
Railroad Co., same as Exhibit 1 in the case at bar p. —
hereof."
(e) Exhibit 3, p. 28 thereof, substituting the state-
ment "Amendment to Articles of Incorporation of the
C. H. M. & D. St. R. Co., same as Exhibit 2A to Exhibit
7 in the case at bar, p. — hereof."
(f) Exhibit 4, p. 29 thereof, substituting the state-
ment "Grant by County Commissioners March 23, 1889,
same as Exhibit A to answer in the case at bar p. —
hereof."
(g) Exhibit 9, p. 34 thereof, substituting the state-
ment, "Resolution of the Village of Carthage, passed
March 19, 1889, same as Exhibit D to answer herein,
p. — hereof."
(h) Exhibit 10, p. 35 thereof, substituting the state-
ment "An ordinance No. 1039 to provide for the ex-
tension of the Cincinnati Inclined Plane Ry. from the
northern terminus of the Carthage Pike over Main St.
and Lockland Avenue to the north corporation line of
the Village of Carthage, passed August 7, 1894, same as
Exhibit E to answer in the case at bar, p. — hereof."

(i) Exhibit 11, p. 37, substituting the statement "Deed of Philip B. Spence, Special Commissioner, to Charles H. Kilgour, May 20, 1898, same as Exhibit 8A to Exhibit 7 in the case at bar, p. — hereof."

(j) Exhibit 11 p. 105 thereof, substituting the statement "Ordinance No. 1039 to provide for the extension of the Cincinnati Inclined Plane Railway from the northern terminus of the Carthage Pike over Main Street and Lockland Avenue to the north corporation line of the Village of Carthage, passed August 7, 1894, same as Exhibit E to answer in the case at bar p. — hereof."

(k) Exhibit 12, pp. 48 to 53 inclusive, substituting the statement "Perpetual lease from C. H. Kilgour to the Millcreek Valley Street Railway Co. October 10, 1898, same as last part of Exhibit 15A to Exhibit 7 in the case at bar p. — hereof."

"Deed from Charles H. Kilgour to the Millcreek Valley Street Railway Co. October 10, 1898, same as Exhibit 10A to Exhibit 7, in the case at bar, p. — hereof."

592

Do not omit that part of Exhibit 12 which is the agreement between the C. H. M. D St. Railway Co. and the Cincinnati Street Railway Co. July 19, 1898, p. 53 and following of Exhibit 8 in the case at bar.

(l) Bill of Exceptions, pp. 66 to 94. Not offered in evidence.

(m) Exhibits 1 and 2 pp. 94 and 95, substituting the statement "same as Exhibit 20 A to Exhibit 7 in the case at bar, p. — hereof."

(n) Exhibit 7, p. 103 thereof, substituting the statement "Resolution of the Village of Carthage, passed February 13, 1889, same as Exhibit B to answer in the case at bar, p. — hereof."

(o) Exhibit 15, pp. 114 to 119 thereof, deposition of Harvey M. Littell. Not offered in evidence.

(p) Exhibit 25, p. 157 thereof, substituting the statement "Decree for sale, Journal 4, p. 338, February 12, 1898, same as Exhibit 9 A to Exhibit 7 in the case at bar, p. — hereof."

(q) Exhibit 26, pp. 166 to 177 thereof, substituting the statement "Petition in the case of the Millcreek Valley Street Railway Co. vs. Village of Carthage, et al. filed August 4, 1898, supplemental to petition, answer of defendants, amendment to petition, answer of defendants to amendment to petition, amendment to answer, etc., reply to answer and cross-petition of Village of Carthage, judgment entry No. 3023 Circuit Court, being the same as the pleadings in Exhibit 7 in the case at bar p. — hereof."

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CITY OF CINCINNATI,
By WALTER M. SCHOENLE,
City Solicitor,
By CONSTANT SOUTHWORTH,
Assistant City Solicitor.

Cincinnati, Ohio, November 7, 1914.

Service of a true copy of the foregoing is hereby acknowledged.

ALFRED C. CASSATT,
For Cincinnati & Ham. Traction Co.
GEORGE H. WARRINGTON,
Counsel for The Cincinnati and Hamilton Trac.
Co. and The Ohio Traction Co., Appellees.

596

(EXHIBIT A.)

"United States District Court, Southern District of Ohio, Western Division.

No. 35. In Equity.

THE CINCINNATI & HAMILTON TRACTION COMPANY, a Corporation,
and THE OHIO TRACTION COMPANY, a Corporation, Plaintiffs,
vs.

THE CITY OF CINCINNATI, a Municipal Corporation, Defendant.

Assignment of Errors.

Now comes The City of Cincinnati, the defendant in the above entitled cause, and files the following assignment of errors upon

which it will rely upon its prosecution of the appeal in the above entitled cause from the decision and decree of this Honorable District Court of the United States for the Southern District of Ohio, Western Division, to-wit:

Said United States District Court for the Southern District of Ohio, Western Division, erred:

(1) In holding that it had jurisdiction of the cause of action set out in the bill of complaint and in holding that the ordinance in question repudiated any grants or impaired or attempted to impair the obligation of any contracts, or deprived or attempted to deprive plaintiffs or either of them of their property without due process of law and without compensation, in violation of any provision of the Federal Constitution;

(2) In holding that the bill of complaint set out facts sufficient to constitute a cause of action against the defendants, The City of Cincinnati.

597 (3) In holding that the bill of complaint set out a cause of action in equity against the defendant, The City of Cincinnati, and in not holding that the plaintiffs' remedy at law was full, adequate and complete;

(4) In holding that the plaintiffs or either of them owned or had the right perpetual or otherwise to maintain and operate a street railway from Vine Street and the entrance to the Zoological Garden to the Carthage Turnpike and over all parts of such line;

(5) In holding that the plaintiffs or either of them owned or had the right to maintain and operate a street railway over the space of about 240 feet from the old north corporation line of the City of Cincinnati over Vine Street and Erkenbrecher Avenue and also on the Carthage Turnpike as against the defendant, The City of Cincinnati;

(6) In holding that the City of Cincinnati was estopped from questioning the ownership and the right of the plaintiffs or either of them to operate and maintain said street railway over all or any part of the line from Vine Street and the Zoological Garden over Vine Street and Erkenbrecher Avenue to the Carthage Turnpike;

(7) In holding that the plaintiffs or either of them owned or had the right perpetual or otherwise to maintain and operate a street railway from Carthage Turnpike and Erkenbrecher Avenue or Ludlow Avenue to the northern terminus of the Carthage Turnpike at or near the County Fair Grounds in the former Village of Carthage, by virtue of the County Commissioners' grant of March 23, 1889, or otherwise;

(8) In holding that the right to maintain and operate the portion of said street railway described in assignment No. 7 was adjudicated or determined in favor of plaintiffs or their predecessors in the case of the State of Ohio ex rel. Hoffheimer vs. The Millcreek Valley Street Railway Company, referred to in paragraph 5

598 of the bill of complaint, or in the case of The Millcreek Valley Street Railway Company vs. The Village of Carthage, or otherwise;

(9) In not holding that the right to maintain and operate so

much of said street railway as lies between the south line of the former Village of Carthage and the north terminus of the Carthage Turnpike at or near the County Fair Grounds in the former Village of Carthage had never been granted by the County Commissioners of Hamilton County, Ohio, to plaintiffs or their predecessors in title, and in not holding that such rights as had been granted by resolution of the Council of the Village of Carthage, March 19th, 1889, had expired;

(10) In holding with reference to the portion of said line mentioned in paragraph 7 hereof that the said County Commissioners' grant was good or effective at the time it was made, or at any time thereafter, and that it is now a good and valid grant, within the limits of the City of Cincinnati and the former town of Clifton and the former village of Avondale and the former village of Carthage, as they were then bounded;

(11) In not holding that the ordinances of the former Village of Carthage, of August 7th, 1894, and of the former Village of Hartwell, of September 16th, 1896, and of May 14th, 1900, were simply extensions of the street railway tracks or line authorized by the resolution of the former village of Carthage, passed March 19th, 1889, and that therefore all rights thereunder to maintain and operate said street railway expired at the same time with the rights granted under said resolution, to-wit, March 19th, 1914;

(12) In not holding that each of said ordinances was invalid because of the want of consents of property owners and in other respects, and in the case of said ordinance of the village of Carthage of 1894, because of the want of publication thereof and advertisement thereunder;

599 (13) In holding that the City of Cincinnati was estopped to question the right of the plaintiffs to maintain and operate the street railway over that portion of Springfield Turnpike lying within the limits of the former Village of Hartwell between De Camp Avenue and the north corporation line, and in holding that the grants from the County Commissioners and from the Turnpike Company or either of them gave plaintiffs any right to maintain and operate said street railway in said portion of the Springfield Turnpike; and in not holding that plaintiffs had and have no right there to maintain or operate said street railway except by virtue of the ordinance mentioned in assignment No. 19 herein;

(14) In holding that the County Commissioners' grant for any portion of the street railway line in controversy in this case was good, or afforded color of title to plaintiffs or either of them;

(15) In not holding that said County Commissioners had no right to grant any franchise for any part of plaintiffs' said line of street railway for a greater length of time than twenty-five (25) years;

(16) In not holding that the twenty-five year limitation in Section 2502, Revised Statutes of Ohio, automatically limited the term of the franchise, if any, granted plaintiffs or their predecessors in title by the County Commissioners of Hamilton County: (a) in ter-

ritory not incorporated, (b) in incorporated territory, if any right said Commissioners had to make any such grants;

(17) In holding that a right to maintain and operate a street railway within the City of Cincinnati could be created by an estoppel of the City of Cincinnati or its predecessors in interest, with or without limit in point of time;

(18) In holding that the City of Cincinnati was estopped to question the right of plaintiffs to maintain and operate all or any part of the line of street railway in controversy in this case;

(19) In not holding that the right of the plaintiffs or either of them to maintain or operate a street railway over all or any part of the line in question in this case exists or can arise solely from and in accordance with Ordinance No. 207-1914, entitled: "An Ordinance No. 207-1914, Specifying the terms and conditions upon which The Cincinnati & Hamilton Traction Company and The Ohio Traction Company, as its lessee, may operate street cars on certain streets of the City and authorizing the City Solicitor to take legal proceedings to enforce the ordinance," passed by the Council of the City of Cincinnati on April 21, 1914, and duly approved by the Mayor of said City;

(20) The Court erred in allowing the temporary restraining order and the preliminary injunction which was granted herein;

(21) The Court erred in not rendering a decree for the defendant, The City of Cincinnati, and against the plaintiffs;

(22) The Court erred in not dismissing the bill of complaint;

(23) The Court erred in not holding that this suit was premature, the same having been brought before the ordinance complained of became effective;

(24) The Court erred in other respects apparent from an inspection of the record.

Wherefore the appellant, The City of Cincinnati, prays that said decision and decree herein be reversed and that said District Court for the Southern District of Ohio be ordered to enter a decree reversing the said decision and decree of the said Court in this cause and dismissing the bill of complaint herein and restoring the City of Cincinnati to all things it may have lost by reason thereof.

THE CITY OF CINCINNATI,
By WALTER M. SCHOENLE,
City Solicitor;

CONSTANT SOUTHWORTH,
Assistant City Solicitor,

Counsel for the City of Cincinnati, Appellant Herein.

601 [Endorsed:] 600/24344. No. 600. October Term, 1914.

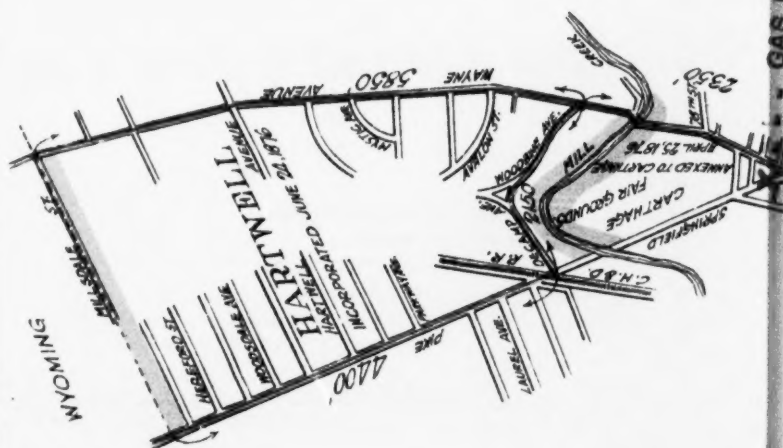
In the Supreme Court of the United States. The City of Cincinnati, Appellant, vs. The Cincinnati & Hamilton Traction Company, et al., Appellees. State- of errors on which appellant proposes to rely and all the parts of the record deemed necessary for the consideration thereof. Walter M. Schoenle, City Solicitor. Constant Southworth, Ass't City Solicitor.

602 [Endorsed:] File No. 24,344. Supreme Court U. S., October term, 1914. Term No. 600. The City of Cincinnati, Appellant, vs. The Cincinnati & Hamilton Traction Co. et al. Statement of errors relied on and designation by appellant of parts of record to be printed, with proof of service of same. Filed November 13, 1914.

Endorsed on cover: File No. 24,344. S. Ohio D. C. U. S. Term No. 600. The City of Cincinnati, appellant, vs. The Cincinnati and Hamilton Traction Company and The Ohio Traction Company. Filed August 20, 1914. File No. 24,344.

Property of City of Cincinnati.

To be returned to City Solicitor
(Case. Ex 35. H. D.)





Office Supreme Court, U. S.

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JAMES D. MAHER

CLERK

Supreme Court of the United States.

No. 226, OCTOBER TERM, 1915.

3710
(24344)

THE CITY OF CINCINNATI,

Appellant,

versus

THE CINCINNATI & HAMILTON TRACTION
COMPANY et al,

Appellees.

Motion of the City of Cincinnati to Advance.

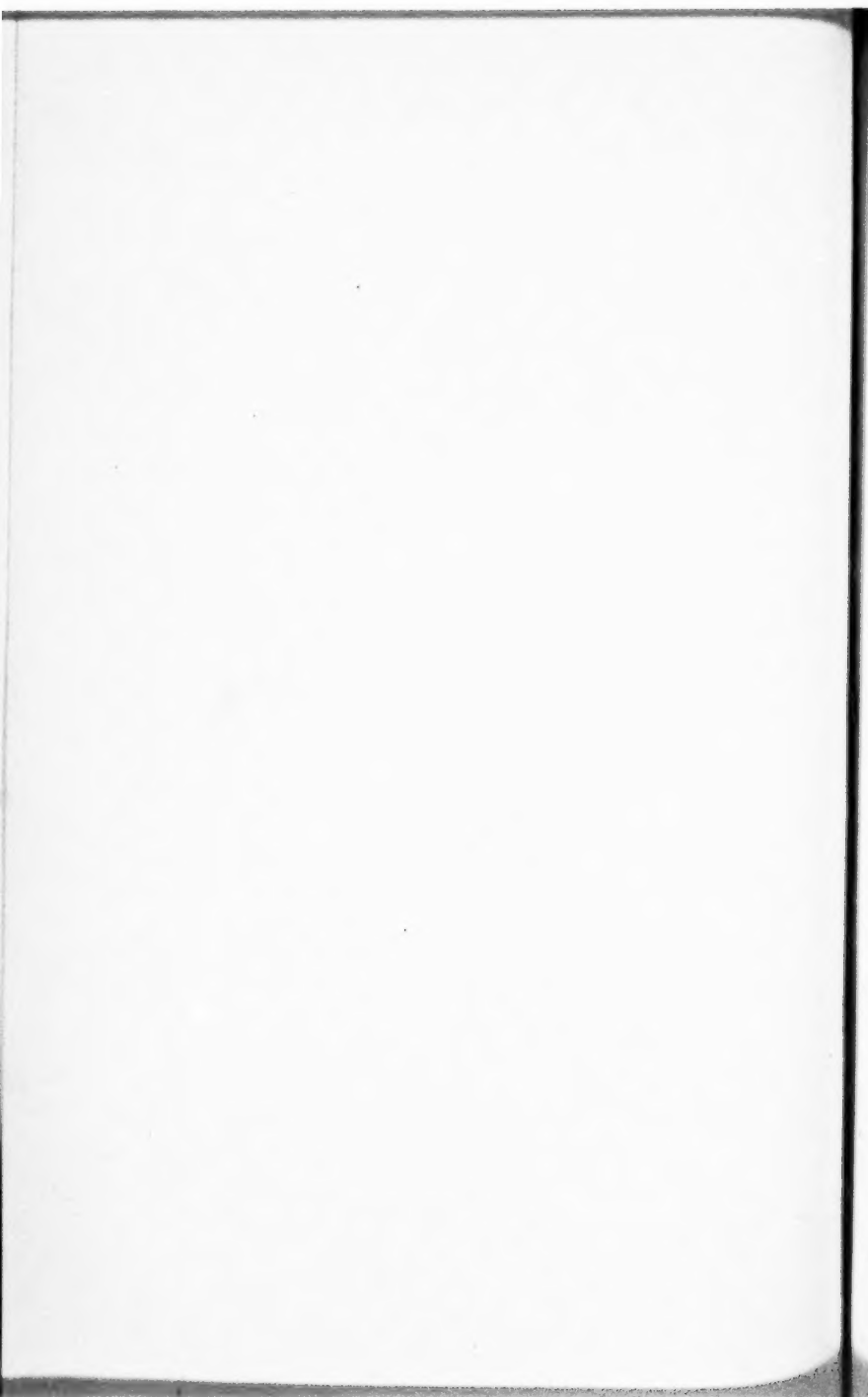
WALTER M. SCHOENLE,

Solicitor of Cincinnati,

CONSTANT SOUTHWORTH,

Assistant Solicitor of Cincinnati,

Counsel for the City of Cincinnati, Appellant.



Supreme Court of the United States.

No. 226. OCTOBER TERM, 1915.

(24344)

THE CITY OF CINCINNATI, a municipal corporation,
Appellant,

vs.

*THE CINCINNATI and HAMILTON TRACTION
COMPANY*, a corporation *et al*,
Appellees.

Motion to Advance.

The appellant, the City of Cincinnati, respectfully shows to the court that the franchise of the appellees to operate an electric street railway over certain streets of the City of Cincinnati and to collect a ten-cent passenger fare expired March 19, 1914, and that thereafter on April 21, 1914 (Transcript of Record, page 7), the City passed a new franchise ordinance for a five-cent passenger fare for carriage between Fountain Square and the northern boundary of the City, and that a permanent injunction was allowed by the trial court preventing said ordinance from going into effect (Record 45).

Appellant further shows to the court that the court erred in certain important particulars as set out in the

assignment of errors (Record 42), and as more fully explained in the brief for appellant heretofore filed herein; and that on account of the small sums involved in each payment of fare it is manifestly impracticable to secure a rebate to the many passengers on the street cars of the appellees for the sums now improperly exacted, to-wit: ten-cents, in the event of the success of the City in this litigation; and that an early hearing therefore is necessary to do justice to the traveling public.

Wherefore, appellant moves the court to advance this cause for an early hearing and assigns particularly the additional following reasons to-wit:

(1) Because the trial judge held that street railway franchises could be created by estoppel for a longer period than allowed by law for an express grant (Brief for appellant, page 39), which as a principle of law applicable to public corporations is a matter of great general and public interest.

(2) Because the case is of great general and public interest to the citizens of the State of Ohio by reason of the holding of the trial court that on certain sections of the line within the City of Cincinnati there is a perpetual franchise, notwithstanding by the express statutory provisions in the laws of Ohio such franchises in municipal corporations are limited to twenty-five years, and can be granted only by the municipality itself. (Brief for appellant, pages 7, 13, *et seq.*)

The same is also true of County Commissioners' grants (Brief for appellants, p. 48).

(3) Because the case is of great general and public interest to the citizens of Cincinnati in that it involves the validity of the five-cent fare ordinance for a distance of about eight miles (Record 70) over the only street railway line between the business center of the City and

the populous suburbs of Carthage and Hartwell, formerly independent villages.

Appellant respectfully refers to its brief heretofore filed herein for the further positions on which it relies on this appeal and motion.

WALTER M. SCHOENLE,

Solicitor of Cincinnati.

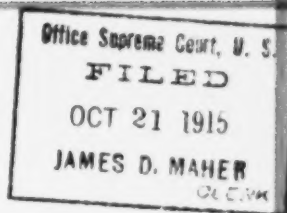
CONSTANT SOUTHWORTH,

Assistant Solicitor of Cincinnati.

September 11, 1915.



3



SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No.



37

The City of Cincinnati, Appellant,

vs.

The Cincinnati and Hamilton Traction Company, and The Ohio
Traction Company.

STATEMENT IN OPPOSITION TO MOTION TO ADVANCE.

The case was docketed on August 20, 1914, and is likely to be reached for oral argument in regular course in March, 1916, so that if it were now advanced it would not be heard much before that date.

The motion to advance is made after the case has been pending for fourteen months. No grounds are stated under Rule 26, and no special or peculiar circumstances are shown.

Lawrence Maxwell,

Ellis G. Kinhead,

George H. Warrington,

Alfred C. Cassatt,

Attorneys for Appellees.



4
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JAN 31 1916

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No. 10

Supreme Court of the United States.

OCTOBER TERM, 1915.

THE CITY OF CINCINNATI,

Appellant.

THE CINCINNATI & HAMILTON TRACTION
COMPANY and THE OHIO TRAC-
TION COMPANY.

Appellees.

Brief for Appellees.

LAWRENCE RAYWELL,
GEORGE A. WASHINGTON,
JESSE C. WOODARD,

Attorneys for The Ohio Traction Company;

ALFRED E. GARRATT,

Attorney for The Cincinnati & Hamilton
Traction Company.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

THE CITY OF CINCINNATI,

Appellant,

No. 600.

versus

*THE CINCINNATI AND HAMILTON TRACTION
COMPANY and THE OHIO TRACTION
COMPANY,*

Appellees.

Brief for Appellees.

STATEMENT.

The Cincinnati and Hamilton Traction Company is the owner, and The Ohio Traction Company is the lessee of a line of electric railway, extending from the intersection of Vine Street and Erkenbrecher Avenue (known as the "Zoo Entrance"), in the City of Cincinnati, northwardly through territory, part of which was in the villages of St. Bernard, Elmwood Place, Avondale, Carthage, Lockland and Hartwell, and part outside any municipality, but in Hamilton County; and northwardly through Butler County to the City of Hamilton in that County. This line was acquired through various grants. (Bill, Rec. 1.)

Prior to the time of the bringing of this suit, the villages in question, except St. Bernard and Elmwood Place, had been annexed to the City of Cincinnati.

On April 21, 1914, the Council of the City of Cincinnati passed an ordinance, reciting with reference to the grants of the Appellees, that—

“On portions of the streets so occupied and used, alleged grants have heretofore expired, and, on other portions, including that part of Carthage Pike, formerly known as Springfield Pike, there never have been any grants, and said Companies have no longer any right to occupy the same.”

The ordinance then provided that from its taking effect the appellee should be permitted to operate over the line in question only upon a day-to-day license, at a reduced fare, and with transfer privileges to the line of the Cincinnati Traction Company, another and different Company, not a party to the ordinance or to this case.

The ordinance contained other onerous provisions, among others, Section 4, which is as follows:

“The continuing by said Companies or either of them, to operate street cars on said streets, shall be deemed an acceptance of this ordinance, and of all the terms hereof.”

In view of the facts, among others, that continued operation after the passage of the ordinance might be treated as an acceptance by the Companies of the terms of the ordinance, and, as in any event, such operation would have led to controversy and altercations with passengers over the question of fares and transfers, the Companies brought suit in the United States District

Court for the Southern District of Ohio to enjoin the operation of said ordinance, on the ground that by said ordinance the City repudiated and violated the grants under which the Companies were operating, and "thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10, of the Constitution of the United States," and that the enforcement of the Ordinance would "deprive plaintiffs of their property without due process of law, and without compensation, in violation of the Constitution of the United States, and particularly Article XIV, in amendment thereof."

A preliminary injunction was granted, and, on final hearing, it was made permanent. (Rec., p. 45.)

The opinion of Judge Sater, which covers the case very fully, is to be found on page 29 of the record.

ARGUMENT.

The line of electric railway in question is made up of several parts, which we may call "links," and which are based on different grants, some of which are perpetual, and others expire at various times. We claim that none of them had expired at the time of the passage of the ordinance complained of, and that they are all in full force and effect at this time.

Counsel for the City seeks to put appellees in the position of claiming franchises "by estoppel," and then proceeds to attack such a method of acquiring franchises.

The appellees do not claim by estoppel, but by express grants, and the opinion of the Court below is based on express grants. The estoppel referred to in the Court's opinion relates principally to the effect of certain litigation, to which the City of Cincinnati was, in effect, a party, and in which appellees' rights were adjudicated.

The City does not seek to eject plaintiffs from the occupancy of any particular part of the streets in question, but undertakes by the ordinance complained of to require plaintiff, in disregard of its rights under existing contracts, some of which the ordinance assumes may be good, either to abandon its line over the route in question, or to operate it on a day-to-day license and at a reduced fare.

THE ORDINANCE IMPAIRS THE OBLIGATION OF CONTRACTS
IF THE PLAINTIFF HAS A VALID, UNEXPIRED CONTRACT
FOR ANY PORTION OF THE LINES.

The question, therefore, is not whether there is one bad link, but whether there is one good link, because, if there is a good link, the ordinance impairs its obligation. This is manifest from Section 2 of the ordinance, which provides that the "operation of street cars on said streets shall be subject to the same terms and conditions as existed under the prior alleged grants, if any, so far as not inconsistent with the provisions of this ordinance, and shall be subject to the following conditions."

"Said streets," means the streets mentioned in Section 1, and comprises all of the streets covered by the line, from its beginning to its end. The result, therefore, is that the ordinance undertakes to prevent the operation of cars on *any* street covered by the entire line, except upon these conditions, and further conditions, one of which is that "necessary arrangements be made to operate the cars from the aforesaid northern boundary of the city over said streets, to Sixth and Walnut streets."

So that, assuming there is one good link, in Hartwell, for instance, the ordinance prevents the operation of cars over that link, except upon the terms of the ordinance,

and the further condition of making "necessary arrangements," to operate cars over that link, and over all other intervening streets, to Sixth and Walnut streets in Cincinnati.

Section 3 contains additional provisions, not based upon the ordinance itself, but arising only after certain things have been "adjudged." Section 3 proceeds that then, "this ordinance shall be construed," etc.

It follows, therefore, that even if some link in the plaintiff's line should be defective, the Court must enjoin this ordinance. It will be time enough to consider the rights of the City in respect of such defective link when an ordinance is passed undertaking to deal with that link. This ordinance is not such an ordinance, but an ordinance which undertakes to impair the obligation even of admittedly valid grants.

This ordinance is not, as claimed by the City Solicitor, an adaptation to local conditions of the ordinance passed by the City of Detroit and sustained in *Detroit United Railway Co. v. Detroit*, 229 U. S., 39.

In *Detroit United Railway Co. v. Detroit*, certain franchises expired in the year 1910. The City passed a resolution that *on the streets on which the franchises had expired* the company might temporarily operate under the same terms and conditions as theretofore existed upon the payment of a rental of \$200 a day to the city; that otherwise the Street Railway Company must cease to operate and remove its tracks. The Court held that the Street Railway Company, if it did not desire to continue to operate under the terms proposed, could be required to cease operating and remove its tracks. There was no attempt, as in the case at bar, to impair the rights of the company on other streets than those on which the grants had admittedly expired.

While this ordinance should be enjoined, even if there were some defective link in plaintiff's line, nevertheless, we submit that the plaintiffs have a perfect right to maintain and operate a street railway line over all the streets named in said ordinance.

THE RULE OF CONSTRUCTION.

We shall consider the several grants in detail hereafter, but we desire first to refer to the rule of strict construction invoked by the City Solicitor.

Counsel contend at considerable length that public grants in case of ambiguity are to be construed against rather than in favor of the grantee, but they do not point out any ambiguity in this case to call for the application of the rule.

They cite the case of *Blair v. Chicago*, 201 U. S., 400. On page 472 the court says that the rule

“requires such grants to be made in plain terms in order to convey private rights in respect of public property.”

The court quoted with approval the decision in *Perine v. Chesapeake & Delaware Canal Co.*, 9 Howard, 172, 192, where the court said:

“The rule of construction in cases of this description * * * is this, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained or unusual construction contrary to the obvious intention of the grant. It must be fairly examined and considered and reasonably and justly expounded.”

The court said on page 473:

“Grants of this character are not to be destroyed by an unreasonable or narrow interpretation.”

In *Citizens Bank v. Parker*, 192 U. S., 73, the Supreme Court states the limits of this rule in the following language on pages 85 and 86:

“The exemption of the charter includes a license tax. This, for the reason stated, must be regarded as part of the contract between the State and the bank. And in reaching that conclusion the rule requiring a strict construction of statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we can not concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute.”

In the case of *Detroit Citizens St. Ry. Co. v. City of Detroit*, 64 Fed., 628, decided by the Circuit Court of

Appeals of the Sixth Circuit, composed of Judge Lurton, Mr. Justice Jackson and Judge Sage, Judge Lurton expressed himself about this rule much to the same effect as the Supreme Court in *Citizens Bank v. Parker*, *supra*. He says on page 640, after referring to the rule:

“But the books abound in rules of construction. They all have one end in view, and that is to ascertain and declare the intent of the act under construction.”

We call the court's attention to his discussion and application of that rule.

The case of *Detroit United Railway Co. v. Detroit*, *supra*, which is quoted by counsel on this point, was one in which the company claimed that the City of Detroit had extended the term of certain expired ordinances therein described by a general street railway ordinance prescribing rates of fare; the court said (p. 44):

“The argument is that, as this ordinance obligates the Railway for the full term of the township grants, which do not expire until December 14, 1921, to sell tickets and transport passengers over its railway, including the portion covered by the now expired grants, the last named grants of the Railway were thereby extended to expire at the same time with the township grants, because only by such construction can the obligation of the Railway to furnish transportation for the full term of the township grants be complied with; that this was a contractual obligation proposed by the City and accepted by the Railway, and necessarily extended the grants of the Railway.”

That claim certainly justified the application of the rule of strict construction, although it hardly called for it.

Cleveland Electric Ry. Co. v. Cleveland, 204 U. S., 116, is a similar case where a renewal of grants was sought to be inferred from certain ordinances relating to another subject, which were obviously not intended to operate as a renewal.

The case of *Blair v. Chicago*, *supra*, is an excellent illustration of the application of the rule. In that case the street railway company had certain twenty-five year grants in the City of Chicago; the corporate life of the company was twenty-five years. In 1865 (page 416) the General Assembly passed an act extending the corporate life to ninety-nine years. In the second section of the act the existing grants to the street railroad company were confirmed

“upon such terms and conditions, and with such rights and privileges, immunities and exemptions, as the said common council has or may by contract with said parties, or any or either of them prescribe.”

Then follows some obscure language which the company contended was an extension of its franchises in the City of Chicago for a period of ninety-nine years.

The Court very justly held that the section had clearly confirmed the grants as made, or as they should thereafter be made by the City Council and that the subsequent language, which it was claimed extended the grants for ninety-nine years, was not sufficiently clear to support the claim in view of the preceding language which clearly confirmed the contracts as made with the City Council with limited terms.

An examination of recent decisions of this court will show that it has considered these public grants broadly, with a view to determining what was the real intention of the parties and what is the just and equitable construc-

tion of their transactions, and has not seized upon provisions in the grants which might have been used to defeat them.

In the case of *The Old Colony Trust Co. v. Omaha*, 230 U. S., 100, the City of Omaha made a simple grant of a right of way for the erection and maintenance of poles for the purpose of transacting a "general electric light business" upon the streets, etc., of Omaha. The ordinance contained the following language:

"And provided further that whenever the city council shall by ordinance declare the necessity of removing from the public streets or alleys of the city of Omaha the telegraph, telephone, or electric poles or wires thereon constructed or existing, said company shall, within sixty days from the passage of such ordinance, remove all poles and wires from said streets and alleys by it constructed, used or operated."

The City of Omaha claiming that the company had no right to sell electricity for heat or power purposes, adopted an ordinance directing the disconnection of all wires transmitting electricity for such purposes.

The court first considered the question whether the company had a perpetual grant, that is, whether or not its entire grant to furnish electricity for any purpose had not expired. It was urged that the ordinance being silent as to time and containing the clause above quoted for the removal of all equipment on notice, it was open to the construction that it was terminable upon sixty days' notice from the city.

Now certainly, if there had been applied to that ordinance the rule of strict construction as described by the City Solicitor in this case, the court might have held that there was no clear indication of an intention to grant a

perpetual franchise, but the Supreme Court held that a reasonable construction must be adopted and held the grant to be perpetual, saying:

“What is meant undoubtedly is that, whenever there is public necessity for removing the poles and wires from the streets and alleys, the council shall have power by ordinance to require that that be done.”

The court also held that the ordinance was not a violation of the provision of the State Constitution that

“no law making any irrevocable grant of special privileges or immunities shall be passed.”

The Supreme Court in reaching this conclusion based its decision upon a state decision, but said:

“This contention is answered and *shown to be untenable* by the decision of the Supreme Court of the state in *Platsmouth v. Nebraska Telegraph Co.*, 80 Neb., 460.”

The court then went on to deal with the question whether the grant to do a general electric lighting business included the right to furnish electricity for heat and power purposes. The court held that the City of Omaha had acquiesced in the conduct of such business by the company and could not, therefore, terminate the heat and power business which was then being done by the company.

In the case of *Owensboro v. Cumberland Telephone Co.*, 230 U. S., 58, an examination of the Owensboro ordinance shows that it contains the following language:

“Sec. 6. This ordinance may be altered or amended as the necessities of the city may demand.”

It was claimed by the City of Owensboro that this showed that the city had no intention of giving a perpetual grant, but the court held:

“This is no more than a reservation of the police control of the streets, and of the mode and manner of placing and maintaining the poles and wires, incident to the unabridgeable police power of the city.” (p. 72.)

It was further claimed in that case that the clause giving the City of Owensboro power to pass an ordinance relating to the control of streets included the power to repeal and that this was a reservation of the power to repeal any franchises.

Upon this proposition the court divided, but the majority of the court gave a broad and equitable construction to the company's rights, saying on p. 73:

“To construe this general power of repeal as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance which, upon its face, makes no such reservation, would be to place every contract made by the city by virtue of an ordinance, legislative in form, subject to the mercy of changeable city councils. In the absence of an express reservation in the contractual ordinance, or an express delegation of power to revoke contracts under such ordinances, we think no such extraordinary power is to be implied. *Ashland v. Wheeler*, 88 Wis., 607, 616; 60 N. W., 818.

And on page 74:

“That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed it must be clear and explicit. The contention here advanced, if conceded, would paralyze the contractual power of the city, for

if it has application to this ordinance, it would equally apply to every other contractual ordinance which the city might enact, though the contract had been accepted and expenditures made."

THE GRANTS CONSIDERED SEPARATELY.

With a proper understanding of the rules of construction as applied by this Court, the several grants may now be considered in detail.

1. ERKENBRECHER AVENUE FROM THE ZOO ENTRANCE TO THE CARTHAGE TURNPIKE.

The Zoological Land Syndicate made a grant to the Cincinnati Inclined Plane Railway Co. (p. 126) from a point which may be described as the Zoo Entrance to the Carthage Turnpike over and along Erkenbrecher avenue. This grant was made April 6th, 1889.

Erkenbrecher avenue was thereafter dedicated as a public street on a plat recorded June 27th, 1890.

The City claims that it may now ignore plaintiffs' occupancy of Erkenbrecher avenue under said grant because there was a small part of the land over which the grant extended which was not owned by the Zoological Land Syndicate; because the grant of the Zoological Land Syndicate was not recorded; because the dedication upon the records does not show the reservation of a street railway route, etc.

If these objections ever had any merit, it is too late for the City to make them now.

The Cincinnati Inclined Plane Railway Co., the grantee, proceeded to construct its street railway line over

Erkenbrecher avenue and it has been operated as such ever since.

In 1895 the Louisville Trust Company, Trustee under the mortgage of the Cincinnati Inclined Plane Railway Co., filed its bill in equity in this court against the City of Cincinnati setting up the said grant from the Zoological Land Syndicate and alleging its right to operate a street railway line thereunder. Substantially the same allegation was made in the intervening petition of Goodman, another mortgagee (Rec., pp. 127, 129).

Said action was subsequently consolidated with an action brought by the Louisville Trust Co. against the Cincinnati Inclined Plane Railway Co. for the foreclosure of the mortgage and in the consolidated case a judgment was entered by which all parties, including the City of Cincinnati, were bound, finding the railway company to be the owner of and the Trust Company to have a lien upon the line of railway commencing at the Zoo Entrance, as alleged, and running along Erkenbrecher avenue (pp. 138, 142).

Under that decree the street railway line, including the portion now under discussion, was sold to C. H. Kilgour by Master Commissioner's deed, dated May 20, 1898 (see page 134).

The City Solicitor claims that Erkenbrecher avenue was outside of the city limits of Cincinnati at the time of the litigation in the Federal Court and that, although it was a party to that litigation, it was not interested therefore in any adjudication with reference to Erkenbrecher avenue.

It seems to us that counsel is plainly in error in this contention. The dedication of the Zoological Land Syndicate to the City of Cincinnati of the territory in question was accepted by ordinance of the City of Cincin-

nati passed May 2, 1890. (Exhibit opposite page 278, record.) The litigation in the Federal Court was subsequent to that time (Rec., p. 127). The decree under which the line was sold was entered February 14, 1898.

In a subsequent action brought by the Millcreek Valley Street Railway Co. against the Village of Carthage, the company expressly alleged (pp. 109, 110) the grant from the Zoological Land Syndicate over Erkenbrecher Avenue and that Erkenbrecher Avenue was dedicated and accepted subject to that grant. That was one of the issues in the case and the court found for the plaintiff on all the issues joined (p. 119).

Carthage afterwards became and is now a part of the City of Cincinnati.

In 1901 the State of Ohio on the relation of a public officer, the Prosecuting Attorney of Hamilton County, brought its action in *quo warranto* (Rec., 173) against the Millcreek Valley Street Ry. Co. et al, alleging in its petition that the Millcreek Valley Co. extended its lines and operated them under authority of the grant of the Zoological Land Syndicate in question (p. 181) and prayed that the company be ousted therefrom.

The answer of the Millcreek Valley Street Railway Co. especially set forth the grant of the Zoological Land Syndicate and its rights thereunder from the Zoo Entrance to the Carthage Pike and that Erkenbrecher Avenue was dedicated to the City and accepted subject to said railway grant (p. 187). The answer also set forth the proceedings and sale in the Federal Court above referred to. Thus the sufficiency of that grant was one of the issues in that case and the court found for the defendants on each and all of the issues joined. (Rec., 178.)

We submit that the validity and scope of the grant on Erkenbrecher Avenue are no longer open to question

by the City of Cincinnati in any court. The appellees have an easement originating in private grant for the operation of a street railway line over Erkenbrecher Avenue. It is perpetual and the rights of the City on Erkenbrecher Avenue are subject to said grant. They did not need to obtain from the City of Cincinnati and do not now require any authority from said City to operate on Erkenbrecher Avenue.

2. CARTHAGE PIKE FROM ERKENBRECHER AVENUE TO GAS HALL IN THE VILLAGE OF CARTHAGE.

The right of the plaintiffs on every part of this section of the line whether within or without any municipal corporation, is based on the grant of the County Commissioners of March 23, 1889 (p. 14).

The power of the County Commissioners to make the grant is found in Sections 3441 and 3443 of the Revised Statutes as they then read.

“Section 3441. If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied.

“Section 3443. Council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated.”

In *Railroad v. Commissioners*, 56 O. S., page 1, the Supreme Court of Ohio decided expressly that Section

3441 applies to roads under the control of county commissioners. See page 7 of the opinion.

The company applied to the County Commissioners on January 22, 1889 (p. 215) for a grant on

“Carthage Turnpike commencing at a point at or near its intersection with Ludlow Avenue and running thence upon and along said Carthage Turnpike to its northern terminus at or near the county fair grounds at Carthage.”

The terminus referred to is the same as “Gas Hall” as heretofore described.

On January 29, 1889, the company sent a communication to the Village of Carthage reciting that the application had been made to the Board of County Commissioners and requesting the Council of the Village to give “permission to occupy and operate its railroad through your village as above contemplated” (p. 218).

On February 13, 1889, the Village of Carthage adopted and sent to the Commissioners the following resolution (p. 224):

“RESOLVED, That the Honorable Board of County Commissioners be and they are hereby requested to grant to the said Cincinnati Inclined Plane Ry. Co. a right of way to construct an electric street railway over the said Carthage Turnpike as asked in their application to said County Commissioners.”

The minutes of the County Commissioners (Rec., 226) of the same meeting at which the above resolution was received, show the following:

“Petitions were received and read from citizens of St. Bernard, Elmwood and Carthage and also certified copy of ordinance attached by Village Council of Carthage requesting this board

(commissioners) to grant the Mt. Auburn Inclined Plane Railway Co. the right to construct a double track railway over the Carthage pike."

On March 23, 1889, the grant was made by the County Commissioners (p 14).

In the meantime, on March 19, 1889, the Council of the Village of Carthage passed a resolution purporting to grant the application of the Cincinnati Inclined Plane Ry. Co. for permission to operate a street railway line in Carthage (Rec., 275).

This resolution was doubtless intended to express the assent of the village to the grant which the village had theretofore requested the Commissioners to make in accordance with the application of the company. As we shall see hereafter, it can not be regarded as having any other effect.

In the subsequent litigation the company relied upon the grant of the County Commissioners and the resolution of the Council of Carthage of March 19, 1889, was either not referred to at all or was merely treated as an assent by the Village of Carthage and an estoppel against any objection on its part.

The *quo warranto* case, brought in 1901 and in which judgment in the Circuit Court was entered in 1904, forecloses the question. The judgment in that case, after finding generally for the defendants, finds specifically that the grant of the County Commissioners was a distinct and independent grant upon the terms therein set forth, to the Cincinnati Inclined Plane Railway Co. of the right to construct, maintain and operate a street railroad on the Carthage Turnpike; that the said grant was duly accepted by the grantee therein named and that the defendant, the Millcreek Valley Street Railway Co., has

become the owner of the street railroad therein provided for "and of all the right and franchise to maintain and operate the said street railroad *as in said resolution provided.*"

The judgment of the Circuit Court was entered on January 6, 1904, and is as follows (Rec., p. 178):

"This cause came on to be heard upon the pleadings, evidence and arguments of counsel, and the court being fully advised in the premises, upon consideration thereof finds each and all of the issues joined in favor of the defendants and each of them. And the court further finds that the grant to The Cincinnati Inclined Plane Railway Company made by the Board of County Commissioners of Hamilton County, Ohio, on the 23d day of March, A. D. 1889, as set forth as Exhibit 4 to the amendment to the answer and the additional answer of The Millcreek Valley Street Railroad Company filed herein March 2d, 1903, was not a grant of an extension of the line of railway then and therefore operated by The Cincinnati Inclined Plane Railway Company on Vine Street in the City of Cincinnati, but that the same was a distinct and independent grant, upon the terms therein set forth, to the Cincinnati Inclined Plane Railway Company of the right to construct, maintain and operate a street railroad in the Carthage turnpike; that the said grant was duly accepted by the grantee therein named, and that the defendant, The Millcreek Valley Street Railroad Company, has become the owner of the street railroad therein provided for, and of all the right and franchise to maintain and operate the said street railroad as in said resolution provided.

"Wherefore it is considered by the court that the petition in this cause be dismissed and that the defendants and each of them recover judg-

ment against the plaintiff for their costs herein expended, taxed at \$——.

“To all of which the plaintiff excepts.

“And thereupon the plaintiff filed its motion in writing for a new trial of this cause for reasons appearing therein, which motion was submitted to the court, and on consideration thereof the court finds that said motion is not well taken, and doth overrule the same, to which ruling the plaintiff excepts.”

This judgment was affirmed by the Supreme Court of Ohio without report. 74 O. S., 453.

It has been suggested that the judgment just quoted does not have the effect which we claim, and which its plain language indicates.

First. Because the company claimed under the Carthage resolution, as well as under the Commissioners' grant, and the judgment may be regarded as based on the resolution. This is untenable, in view of the language of the judgment.

Furthermore, the company did *not* claim under the Carthage resolution. The separate answer of the Millcreek Valley Street Railroad Company (page 187), shows that the sole claim was under the Commissioners' grant of March 23d, 1889. On page 188, it is averred that said grant of the County Commissioners was, “made at the special instance and request of said villages of Carthage and St. Bernard.” The only reference to the Carthage resolution of March 19th, is in the amendment to the answer (Rec., 194), where said resolution is filed and attached as an exhibit, without comment. This answer was filed by leave, after replies had been filed, and the reference to the Carthage resolution was doubtless intended to support the allegation in the original answer,

of the "special instance and request," of the village of Carthage.

The records of the foreclosure case in the Federal Court, and of the injunction case against Carthage in the State Court, are a part of the record in the *quo warranto* case. In the injunction case against the village of Carthage, the grant of the county commissioners solely was relied upon by the company as the foundation of its title, no reference being made to the Carthage resolution of March 19th. The decision of the Circuit Court of Hamilton County, 18th C. C., 216, printed and filed as an appendix hereto and affirmed by the Supreme Court of Ohio without report, makes no reference to the resolution of March 19th, but refers to the resolution of Carthage, requesting the commissioners to grant the right-of-way. An examination of the consolidated foreclosure case in the Federal Court will show that the company and the mortgagee relied solely on the grant of the County Commissioners.

The reason why the Carthage resolution of March 19th was not referred to, or relied upon, as the source of title is evident from an examination of the resolution (Rec. 275), and of the statutes (Sections 2501, 2502), governing grants by municipal corporations.

Section 2501 expressly requires that the action of council shall be by ordinance, which shall prescribe terms and conditions upon which the road shall be constructed and operated. If Carthage had intended to make an independent grant, or do anything more than assent to the grant and invite the construction of the road, it would have taken action in the form of an ordinance, as it did five years later in making the grant from Gas Hall north.

Section 2502 requires that before such an ordinance as is referred to in 2501 is passed, public notice of the

application therefor must be given by the clerk of the corporation in one or more of the daily papers, or weekly papers, published in the corporation, for the period of at least three consecutive weeks. There is no claim that there was any advertisement of the resolution of March 19th. On the contrary, Mr. Hammel, who was then the Village Solicitor, has testified in this case that there was no advertisement (Rec., 64).

Moreover, Section 2502 provides that no such grant shall be made except to the corporation that will agree to carry passengers at the lowest rates of fare. Not only is there no showing of compliance with this essential requirement of the statute, but the Carthage resolution of March 19th contains no provision whatever with reference to fares. Five years later when Carthage actually undertook to make a grant of its own, over its own streets north of Gas Hall, its action was not only by ordinance, but it contained specific provisions as to fares in compliance with the statute.

These steps and features, which we have shown to be lacking in the Carthage resolution are all jurisdictional, and their absence indicates not only that the resolution *did* not in fact constitute a grant, but also, that it was not *intended* to constitute a grant.

Moreover, the decree in the *quo warranto* case must be regarded as upholding the Commissioners' grant, irrespective of the village action of Carthage, because the Commissioners' grant extended likewise through the villages of Clifton and Avondale, where there was no village action of any kind.

The printed briefs of counsel, in the *quo warranto* case, were handed to the Court below. They show that neither party regarded the Carthage resolution of March 19th as being an effective grant by the village of Carthage, or as

the foundation of the franchise of the Street Railway Company in Carthage. The company squarely claimed a grant from the County Commissioners over the entire length of the turnpike, as set forth in the grant, irrespective of action or consent by Clifton, Avondale, or the other villages, and the Court upheld that claim.

Second. It has also been suggested that the specific language of the decree in the *quo warranto* case can be accounted for, because there was a claim in the case that if the grant of the County Commissioners was a mere extension to the line of the Cincinnati Inclined Plane Railway Company, no additional fare could be charged, and that the special finding of the Court with reference to the grant of the County Commissioners was merely to indicate that it was not an extension, as claimed. But that result could have been accomplished by the mere statement that the line of the defendants beyond the Zoo entrance was not a mere extension; or, if the court had rested its judgment upon the Carthage resolution of March 19th, its decree would have found that the line covered by the grant of the County Commissioners, and the resolution of the village of Carthage, did not constitute an extension. But the court went further and held specifically, that the Commissioners' grant in question was a distinct and independent grant to the Cincinnati Inclined Plane Railway Company, of the right to construct, maintain and operate a street railroad in the Carthage turnpike and that the Millcreek Valley Railway Company had become the owner of the street railroad provided for, "and of all the right and franchise to maintain and operate the said street railroad as in said resolution provided."

This specific language is not to be accounted for on the theory suggested.

Third. It has been suggested that the Commissioners' grant did not purport to be independent of action by the villages, because—

(a) By Section 4, villages through which the road is located, were permitted to indicate whether the tracks should be laid in the center or on the side of the street.

But the Commissioners, having power to make the grant, and to prescribe the location of the tracks, could properly permit villages or even abutting property owners, to subserve their own convenience or interest in the matter of the location of the tracks. A familiar illustration of this is where legislative grants to street railway or other public utility companies contain the provision that the engineer or other authority of the municipality must consent, or may regulate the location of the tracks, poles, wires, etc. In such cases it is held that the municipality does *not* participate in the grant, but is merely given certain local supervision of a grant proceeding from a higher authority. *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 658.

(b) Some significance is sought to be attached to the language in Section 5, that the road is to be constructed and put in operation within twelve months from the time said company, "shall have acquired the legal right to so construct." It has been claimed that this is, in effect, a construction by the County Commissioners that the company did *not* "acquire the legal right to so construct," from the grant made by such Commissioners. But this language, even if unexplained, would not support that contention, in view of the unequivocal terms of the Commissioners' grant, and its comprehensive character.

But the language in question is easily explained. The Commissioners may have had in mind that the "legal right to so construct" dated from the acceptance of the

grant by the company; or from the giving of the bond on or before April 10th, provided for in Section 9 of the grant. Or the Commissioners may have referred to the corporate power of the company to extend its lines, which was provided for by an amendment to the articles of incorporation voted by the stockholders on February 23, 1889 (Rec., 212), which may or may not have been actually filed with the Secretary of State at the time that the grant of the County Commissioners was prepared.

However, the points which are sought to be raised by these references to the language in the two sections of the grant referred to are foreclosed by the judgment of the Circuit Court, affirmed by the Supreme Court in the *quo warranto* case, which holds that the County Commissioners' grant was a separate and independent grant by the County Commissioners over the entire portion of the turnpike covered by the grant.

The Commissioners' grant was comprehensive in character. It extended over the Carthage turnpike, through the villages of Clifton, Avondale and St. Bernard, and through county territory.

A better illustration could not be given of the reason why the law gives County Commissioners the power to make grants to street railway companies over county roads, in and out of municipal corporations. If the extension of this line of railway had been dependent upon separate and distinct grants by every village which was touched, as well as by the county, for the unincorporated territory involved, there would necessarily have been a conflict of terms and conditions, resulting in impairment of service and embarrassment to the grantee. All this was avoided by an exercise of their power by the County Commissioners, to make one grant for the entire line, containing all the necessary provisions. The entire work

was to be done to the satisfaction of the County Engineer and the County Commissioners. Passengers were to be carried to Fountain Square, and by Section 6, a schedule of fares for each and every part of the route was provided. This is the essential element that was lacking in the Carthage resolution of March 19th.

Fourth. Finally, it is claimed that the judgment of the Circuit Court (affirmed by the Supreme Court of Ohio) in the *quo warranto* case can not have the effect which its language indicates, because it would thus be in conflict with other decisions of the Supreme Court. That would be quite immaterial if true. The Supreme Court in affirming that judgment held that this particular grant of the County Commissioners, to the full extent therein set forth (which means to the northern terminus of the Carthage pike), was a distinct and independent grant, and that the Millcreek Valley Railway Company was the "owner of the street railroad therein provided for, and of all the right and franchise to maintain and operate the said street railroad, as in said resolutions provided."

It is immaterial, therefore, what the other decisions of the Supreme Court may be.

But it is not true that other decisions of the Supreme Court are to the contrary. The case principally relied on by the City Solicitor, is *Electric Street Railroad Company v. Hamlet of North Bend*, 70 O. S., 46, which we respectfully submit has nothing whatever to do with the case. There was no claim made in that case of a right to operate on a county road within a municipality by virtue of a grant from County Commissioners. The highways in question there were streets of the former hamlet of North Bend. The company contended that under the Municipal Code, which had just been adopted, the village of North Bend, having failed to elect village

officers, became unincorporated territory, wherein the Commissioners had control of the streets or highways. The Court held that North Bend had become a village in spite of its failure to elect village officers. It followed that the County Commissioners had *not* acquired control of the highways as unincorporated territory.

As a matter of fact, the railroad company did not have a grant from either the Commissioners or the village authorities. But the opinion did not purport to deal with a county road, over which the Commissioners had control, but solely with a village street, over which the village had exclusive control.

In *County Commissioners of Richland County v. Citizens Electric Railway, Light & Power Company*, 56 O. S., 1, the street railway company in Mansfield, Ohio, undertook to extend its line outside of Mansfield, and over a county road, without obtaining a grant from the County Commissioners, and under the alleged authority of Section 3438, Revised Statutes, as follows:

"The right so to construct or extend such railway within or beyond the limits of a municipal corporation, can be granted only by the council thereof, by ordinance," etc.

The Court held that this did not give the power claimed by the railway company. The Court took very strong ground as to the power of County Commissioners over the roads of the county, and construed Section 3438 as referring merely to a grant of *quasi-corporate* power by a municipality to a city street railway line to extend its operation beyond the city, leaving the company to obtain from the County Commissioners the right to use county roads.

In *County Commissioners v. The A. B. C. Railroad Company*, 21 C. C., 769, the decision was by the Circuit

Court, and it can hardly be claimed by the City Solicitor that the later decision of the Supreme Court in our case is to be construed in the light of that Circuit Court decision. However, all that was held in that case was that because Section 1650, R. S., gave the trustees of a hamlet *exclusive* jurisdiction of public roads within the limits of the corporation, the trustees of such hamlet had the power to grant a franchise to an interurban street railway company, and that the Commissioners could not object. Attention was called by the Court to the fact that this grant of power to the trustees of hamlets was stronger than Section 2640, R. S., giving the control of streets to the council of other municipal corporations.

We refer the Court to the case of *Lewis et al v. Laylin et al*, decided in September, 1889, by the Supreme Court of Ohio, 46 O. S., 663, on the power of County Commissioners over County roads within municipalities.

The Court says (pages 671-672) :

“That a state or county road is not extinguished by becoming a street of a municipal corporation is clear. It retains its character of a state or county road, even as to such portions of it as may chance to fall within the limits of a municipal corporation, that may be subsequently organized ; nor is this character changed because the municipal authorities call it a street and give to it a name as such, and are invested by law with its general control. Should the municipality cease to exist, the highway would at the same time cease to be a street, but it would not cease to be the state or county road which it was originally.

“If so apparent a proposition requires support from authority, enough will be found in the case of *Bisher v. Richards*, 9 Ohio St., 485, where it was held, that the laying out of a state

road over a county road did not extinguish the latter, but that both might co-exist. If that is so, upon the same principle, a state or county road would continue to exist after its adoption by a municipal corporation as a street.

"It has also been held in this state, that under a statute giving the commissioners general power to lay out and establish county roads, they were authorized to lay out and establish a county road *within or through* an incorporated town or city. *Wells v. McLaughlin*, 17 Ohio, 99. Also, one 'whose *termini* are *wholly* within the limits of an incorporated town or city.' *Butman v. Fowler et al*, 17 Ohio, 101. These cases establish the doctrine, that territory, within a municipal corporation, is not exempt from the operation of general laws giving authority to county commissioners respecting public highways."

The dominant power of the County Commissioners is also indicated from another angle by the case of *Railroad v. Cummins*, 53 O. S., 683, where the judgment below was, "affirmed on the sole ground that the municipal council has no power to vacate that part of a county road which lies within the municipality."

By the Act of the General Assembly of Ohio of March 24, 1852 (49 Ohio Laws, 147), the Commissioners of Hamilton County were authorized to improve and maintain roads in the county and establish toll-gates thereon.

The policy of the State of Ohio toward this particular turnpike, at or about the time of the Commissioners' grant, is indicated by the Act of the Ohio Legislature, of April 25th, 1893 (Local Laws, 243), recognizing the exclusive control of the County Commissioners over the Carthage turnpike, and authorizing them to issue bonds and levy a special assessment for the improvement of this pike, including that portion within the village of

Carthage. That Act also recognized the Commissioners' grant as being the basis of the street railway franchise of the plaintiffs, for it contained the following language: "That the grading and paving of so much of the roadway as may be occupied by any street railway company, shall be paid for in accordance with the terms and conditions with reference to roadways, contained in the grant by the County Commissioners of Hamilton County, to said street railway company, to operate a street railway on said road."

The judgment of the Circuit Court of Hamilton County, affirmed by the Supreme Court in the *quo warranto* case is conclusive, and being in an action brought by the State, calling in question the rights of the company over the entire line—it is binding upon the city of Cincinnati, which is the mere creature of the State.

The City Solicitor asserts that the judgment in *quo warranto* is not a bar under the decision of the Supreme Court of Ohio in the case of *State, ex rel, v. The Cincinnati Gas Light & Coke Company*, 18 O. S., 263, 302. In making this contention the City Solicitor misapprehends the nature of the two kinds of proceeding in *quo warranto* authorized by the statutes of Ohio. The action in *quo warranto* in Ohio is governed entirely by the provisions of Title VIII, Chapter 1, Sections 12303 to 12344, inclusive. Section 12304 authorizes the bringing of an action in *quo warranto* against a corporation "when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right, in contravention of law." This action may under Section 12305 be brought either by the Attorney-General of the State or by a Prosecuting Attorney, and either by direction of the Governor, the Supreme Court, or the General Assembly, or upon the belief on the part of the Attorney-General or a Prose-

cuting Attorney that good reasons exists for bringing the action. The action so brought is a public action on relation of a public officer, and for the purpose of asserting a public right against a usurper. Such an action was that of *The State of Ohio on relation of Harry M. Hoffheimer, Prosecuting Attorney of Hamilton County v. The Mill-creek Valley Street Railway Company et al*, discussed at length *supra*. The right asserted was strictly the public one to have public roads unincumbered by unauthorized occupaney by tracks and street cars. The powers of the Attorney-General and of the Prosecuting Attorney to bring such action were equal and a judgment in the proceeding would necessarily have the same effect whether the action were brought on the relation of the one or the other of these public officers. As the action was brought on the relation of the Prosecuting Attorney for the assertion of a public right against a claimed usurpation the judgment necessarily determined the question of usurpation against the State and in favor of the defendant. That conclusion is binding upon the State and all of its governmental subdivisions and agencies. Control by the City of Cincinnati over public roads within the present territory of the City is a delegated exercise by the municipality of a governmental function of the State and the authority of the City with respect to these roads is dependent upon and subordinate to that of the State. Its rights, therefore, are no greater than those of the State, and a determination of the rights of the company as against the State is necessarily determinative as against the municipality.

The case referred to by the City Solicitor, *State, ex rel, v. The Cincinnati Gas Light & Coke Company*, contains in the fourth proposition of the syllabus and in the opinion, at page 302, the statement of an entirely different

situation and one which affords no authority for the contention of the City Solicitor that the judgment in the case of *State, ex rel Hoffheimer, v. The Millcreek Valley Street Railway Company* is not a bar. It was held by the Supreme Court in the case cited by the City Solicitor that a judgment in favor of the defendant rendered in a *quo warranto* proceeding filed by a Prosecuting Attorney, *upon an individual relation*, was not a bar to subsequent proceeding by the State on the relation of the Attorney-General in his public capacity. This holding is manifestly correct. A proceeding in which the Prosecuting Attorney acts in behalf of a private relator is one in which a private right of that relator is asserted against a defendant, and the adjudication determines nothing save the rights between the relator and the defendant.

The statutes of Ohio clearly recognize the distinction and provide different procedure for actions by the State's attorneys in the assertion of public rights and those other actions prosecuted on the relations of a private individual. In the latter class of cases the officer has not even authority to proceed without leave of court, see Section 12306. This class of action is one in which the name and authority of the State is sought to be used for the assertion of a private right only and it is hedged about with conditions and its determination is subject to restrictions which are not provided for and have no place in strictly public actions in *quo warranto* brought by the State's attorneys on their own relation and in the interests of the State.

We submit, therefore that the ownership by plaintiffs of an independent grant by the County Commissioners to Gas Hall in Carthage is not open to question in any court. The only question remaining is the duration of said grant, considered as a grant by the County Commissioners.

THE COMMISSIONERS' GRANT IS PERPETUAL.

The grant of March 23, 1889, by the County Commissioners, being without limitation as to time, is perpetual.

The Commissioners not only had control of the road, but under Sections 3441 and 3443 had the express power to fix the terms and conditions for the construction of railways on public roads.

In the case of *Owensboro v. Cumberland Telephone Co.*, 230 U. S., 58, it was held that the City of Owensboro, under its power to "regulate the streets, alleys and sidewalks with all improvements and repairs thereof" had the power to grant to the Telephone Company a perpetual grant upon its streets and that having made a grant silent as to time, said grant would be held to be perpetual.

The court cited in support of its ruling:

Detroit v. Detroit Street Ry. Co., 184 U. S., 368,
391 and

People v. O'Brien, 111 N. Y., 1,

which are street railroad cases. See also to the same effect,

Boise Water Co. v. Boise City, 230 U. S., 84.

Old Colony Trust Co. v. Omaha, 230 U. S., 100.

Louisville v. Cumberland Telegraph & Telephone Co., 224 U. S., 649.

The City Solicitor claims that Section 2502, Revised Statutes, limits the duration of such grant to twenty-five years, but an examination of that section will show it refers solely to grants by municipal councils. Grants by County Commissioners are provided for and governed by wholly different sections of the Revised Statutes, to-wit, Sections 3441 and 3443.

Our contention that the 25-year limit does not apply to grants by County Commissioners is supported by the history of Section 3439.

As originally enacted in the Revised Statutes this section made grants by the Commissioners subject to the provisions of Sections 2501 to 2505 inclusive. Section 2502 thus included is the section upon which the City Solicitor relies for the 25-year limitation. But before the making of this grant in 1889, Section 3439 had been so amended as to exclude Section 2502 from application to the grants referred to in Section 3439.

This shows expressly the legislative intention that the limitations of Section 2502, including the 25-year limitation, should not apply to grants by County Commissioners.

The claim of the City Solicitor that the amendment to the statute bringing about this result was unconstitutional because not applicable to a county containing a city of the second grade of the second class is not tenable.

The present doctrine as to special legislation can not destroy rights obtained under such legislation in 1889 when it was repeatedly held by the Courts to be valid.

Thomas v. State, 76 O. S., 341.

The case of *East Ohio Gas Co. v. City of Akron*, 81 O. S., 33, is not authority in this court against our contention that the grant of the County Commissioners was a perpetual grant.

All that that case decided was that where the contract between the gas company and the city was silent as to the duration of the franchise and the ten-year agreement as to the price of gas had expired, the company was not bound to continue to furnish gas after the expiration of the ten-year period if it was not satisfied with the new conditions as to price offered by the municipality (p. 53).

The syllabus must be read in view of the facts.

In re Poage, 87 O. S., 72, 82.

Furthermore, that decision, even if it supported the contention of the City Solicitor, could not control the decision of this Court, in view of its decisions above referred to.

In a case brought in the Federal Court for the impairment of the obligation of a contract, the federal court will determine for itself the terms and duration of such contract and will not be controlled by any decision of the State court, unless, perhaps, the same was rendered and in force prior to the making of the contract in question.

In the case of *East Tennessee Telephone Co. v. Councilmen of Frankfort*, 190 F., 346, the grant in question is thus described by the court:

"The language of the grant is that the petition for 'permission * * * to erect telephone poles in different streets of the city and to carry it across the city bridge was presented and granted.'"

Judge Cochran held this to be a perpetual grant in spite of a decision of the Court of Appeals of Kentucky that the said grant was revocable at any time by the City of Frankfort on reasonable notice.

This Court held the mechanic's lien law of Ohio to be constitutional under the Ohio Constitution after the Supreme Court of Ohio had held it to be unconstitutional.

Great Southern Fire Proof Hotel v. Jones, 193 U. S., 532.

This Court exercised its own judgment on that question because the rights of the parties in the case before them had accrued before the decision by the State Supreme Court.

3 MAIN STREET AND LOCKLAND AVENUE FROM GAS HALL TO THE NORTHERN BOUNDARY OF CARTHAGE.

The right of appellees over this section of the line is based upon the ordinance of the Village of Carthage of August 7, 1894 (p. 17).

This part of the line was set up, adjudicated and sold in the proceedings in the federal court heretofore referred to.

Its validity was adjudicated in the case of *The Millcreek Valley St. Ry. Co. v. Village of Carthage* (p. 109 *et seq.*).

Also adjudicated in *State of Ohio, ex rel Hoffheimer, v. Millcreek Valley St. Ry. Co.* (pp. 179, 181, 195).

The ordinance in question was without limit as to time. Treated as an original grant it would not expire before the end of 25 years, namely August 7, 1919; treated as an extension the 25-year limit would not apply. The line of which it was an extension was the line authorized by the grant of the County Commissioners, which, as we have seen, is unlimited in duration.

There is no valid theory upon which it has now expired or can expire before August, 1919. The theory of the City Solicitor that it expired March 19, 1914, is based upon the City's contention that the plaintiffs' right to operate their main line in Carthage expired on that date, which, as we have seen, is erroneous.

4. WAYNE AVENUE IN HARTWELL.

Plaintiff's rights on this section of the line are founded on the grant of the Village of Hartwell dated September 16, 1896 (Rec., 19). There can be no question that this

is an original grant by the village and not a mere extension of the Carthage franchise as claimed by the city. The records of Hartwell in evidence show that the application for the right to construct this line was duly made by the company; that public notice thereof was duly advertised by the clerk of the village under orders of the Council (Rec., 268-270), all as provided in Sections 2501 and 2502 and that thereafter the grant of September 16, 1896, was made. The records further show that the Council considered the very question as to whether this grant should be made without complying with the requirements of Sections 2501 and 2502 and under the advice of the Village Solicitor the Council determined that all of the formalities required by these sections should be complied with (Rec., 54-55-56). It is true that competitive bids were not shown, but it is not claimed that there is any requirement in the statute that there be more than one bidder. The statute does not require that a record of bids shall be kept and entered on the minutes any more than it requires that a record of the consents of property owners be preserved and entered on the minutes. It is not claimed that it is incumbent upon the company to show that consents of property owners which are a prerequisite of the validity of any street railway grant were given as there is a presumption from the making of the grant that such formalities were complied with. This has been expressly decided in the case of *Ireton Brothers v. Traction Co.*, 2 N.P.(N.S.), page 317, and *State v. Street Railway Company*, 11 C.C.(N.S.), page 263.

The Court said on page 268:

"It is claimed by the relator that the ordinance was not published as required by the statute, and for that reason it is void. It was not

incumbent upon the railway company to discharge this duty; it was upon the city. It seeks now to avail itself, to the prejudice of the company, of its own omission. Being incumbent upon the city, the burden of establishing this omission is upon it. We are of the opinion it has not discharged it; and in the absence of testimony on the point the presumption is that the ordinance was published.

“The relator claims there is no proof of consents. Whether any were given as to the extension should not avail the city here, as that is a matter of the abutting land owners alone, and no one of that class is here complaining. The lapse of so many years after the extension was granted, without protest, we are inclined to the view that in law it constitutes a waiver.”

The judgment in that case was affirmed by the Supreme Court of Ohio without report. (81 O. S., page 502.)

These cases decide that the burden of proof to show that such formalities were not complied with is upon the party making such assertion. The city has not attempted to sustain this burden of proof and it is significant that Louis B. Sawyer, who was Village Solicitor of Hartwell at the time this grant was made, was called as a witness by the city (Rec., 262) and was not even asked as to competitive bids, although counsel for the city did not overlook asking this very question of the next witness, Mr. Hammel (Rec., 64), as to the same formalities in Carthage.

This grant of 1896 although silent as to time is admittedly valid for 25 years after its date, until 1921.

5. RURAL AND DECAMP AVENUES IN HARTWELL.

The rights of appellees upon these avenues are based upon the ordinance of May 14, 1900, which is a mere extension ordinance and did not require advertisement (Rec., p. 22). This appears from its title, as follows:

“Ordinance No. 679 granting to The Millcreek Valley Street Railway Company an extension of its present street railroad route in the Village of Hartwell.”

The recitals show that the company made application in writing to extend its present street railroad line in Wayne avenue, that written consents of the property owners were obtained and that “in the opinion of council said extension of said route will be a public convenience and benefit to the property affected thereby,” which are almost the identical words prescribed by the statute in the case of extensions. This grant is silent as to time, but no theory has been advanced upon which it can be claimed that it has now expired. It can not expire at the earliest until September 16, 1921, the date of the expiration of the original grant of September 16, 1896. By ordinance of April 1, 1901, an extension was granted over Rural Avenue upon the conditions and for the period of the ordinance of May 14, 1900 (Rec., 271).

6. SPRINGFIELD TURNPIKE.

Appellees' title to their line upon Springfield Pike is based upon (a) a grant from the company owning the pike dated March 19, 1895 (Rec., 260), which is perpetual in terms; and (b) a grant from the Board of County Commissioners of Hamilton County for the specific pe-

riod of 25 years, dated March 14, 1900 (Rec., 263, 266), and conferring a right to operate over said pike all the way to the north line of Hamilton County.

The evidence shows that the portion of the Springfield Pike in question was surrendered to the county in 1897 (Rec., 56, 272). Their control thereof follows as a matter of law and it appears from the evidence that at the time of trial the County was engaged in the repair of said turnpike for its entire width at this point (Rec., 58).

A witness testified that the corporation line of Hartwell extended to the middle of said turnpike but admits (Rec., 62), that his testimony was based solely upon a plat, a tracing of which with all endorsements thereon was put in evidence. We submit that said plat does not show the fact claimed by the City, namely, that the boundary line of Hartwell extends to the middle of the turnpike.

The City has not undertaken to show in this case the formal proceedings required by the statute to create the Village of Hartwell and define its boundaries.

It can not be claimed that the mere filing of this unacknowledged plat served to deprive the then private corporation which owned this turnpike of its rights of ownership and control over one-half of it in the Village of Hartwell. Neither the Village of Hartwell nor the City of Cincinnati has ever attempted to exercise any right or control whatever over any part of this turnpike. Until 1897 it was within the complete control of the corporation which owned it; since 1897 it has been within the complete control of the County Commissioners and they are even now engaged in improving the whole width of the pike at the place in question.

APPELLEES HAVE GOOD TITLE OVER ENTIRE LINE.

We submit we have shown that appellees have a good title to every part of the street railway line covered by this ordinance, but we again urge upon the court that the question here is not whether there is one bad link, but whether there is one good link, because if there is a good link the ordinance impairs the obligation of the grant or contract upon which it rests.

EXPENDITURES ON FAITH OF GRANTS.

It appears from the evidence of Mr. Draper (Rec., 68), that several hundred thousands of dollars have been spent upon the line in question by appellee, the Ohio Traction Company, since its lease in 1902, in addition to the sums spent by the owners in the original construction of the line.

JURISDICTION.

The bill alleges and the proof shows impairment of contract rights of appellees. The District Court had jurisdiction to enjoin such impairment, irrespective of citizenship.

In *Defiance Water Co. v. Defiance*, 191 U. S., 184, cited by appellant on page 12 of its brief, the bill did not set forth the resolution or ordinance complained of in *extenso* but when it appeared in the evidence the court was of the opinion that "clearly this resolution was not a law impairing the obligation of the contract." (p. 193.)

The first quotation on page 12 of appellant's brief from the opinion in that case follows immediately after the following sentence:

“In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction *and application* of the constitution and it is readily seen that cases in that predicament must be rare.” [Italics ours.]

The Defiance case is not authority for the contention that where a city ordinance does impair the validity of an existing contract the injured party must work out his rights through the state courts; on the contrary, the original jurisdiction of the United States Courts has been invoked and sustained under such state of facts in numerous cases, of which the following are typical,

Detroit v. Detroit Citizens St. Ry. Co., 184 U. S., 368.

Owensboro v. Cumberland Telephone Co., 230 U. S., 58.

Boise Water Co. v. Boise City, 230 U. S., 84.

Old Colony Trust Co. v. Omaha, 230 U. S., 100.

The ordinance in the case at bar did more than direct the City Solicitor to take legal action against the companies to enforce said ordinance. The ordinance declared the company to be a trespasser upon the streets from the date of its taking effect, and authorized it to operate only upon the conditions set forth in the ordinance itself namely—

(a) A reduced fare.

(b) Transfers to lines owned by a separate and distinct company, not a party to the ordinance or to this suit.

(c) The acceptance of the terms of the ordinance.

It was immaterial, therefore, whether the City Solicitor should ever take proceedings under Section 5 of the

ordinance to enforce its provisions, as the ordinance was in form self-executing. On the day that it took effect, the company, if it undertook to run its cars, would be exposed to controversies or altercations with passengers as to fares and transfers and would be further exposed to the claim on the part of the city that by operating its cars it had accepted the terms of the ordinance, including an abandonment of its rights and an acquiescence in the day to day license.

The ordinance was clearly, therefore, a direct, self-executing impairment of appellee's rights.

The danger of controversies with passengers over fares was sufficient to justify an injunction. In *Detroit v. Detroit Street Railway Company*, 184 U. S., 368, this court said, on page 379:

"Of course, if the complainant obey these ordinances no controversy can arise, but if in good faith, it believes them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of non-payment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then

the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement."

We submit that the judgment of the court below was right and should be affirmed.

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~~No. 226.~~

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OCTOBER TERM, 1915.

THE CITY OF CINCINNATI,

Appellant,

versus

THE CINCINNATI & HAMILTON TRACTION
COMPANY and THE OHIO TRAC-
TION COMPANY,

Appellees.

Appendix to Brief for Appellees.

Opinion of Circuit Court of Hamilton County in The Millcreek Valley Street Railway Company vs. The Village of Carthage et al, 18 Ohio Circuit Reports, 216. Affirmed without opinion by Supreme Court of Ohio, 62 Ohio State, 636.

History of Section 3439, R. S., and Decisions.

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APPENDIX.

THE MILL CREEK VALLEY STREET RAILWAY COMPANY, A
CORPORATION, v. THE VILLAGE OF CARTHAGE ET AL.
(18 Ohio Circuit Court Reports, p. 216.)

Appeal from the Court of Common Pleas of Hamilton
County.

VOORHEES, J.

It will be sufficient for the exposition of the law applicable to this case, to state the following facts:

The petition avers the corporate capacity of the plaintiff, its ownership and possession of the electric street railway, which passed through the defendant village. It recites the source of title to the railway property now vested in the plaintiff company; that the road was constructed, maintained and operated at great cost and expense upon the faith of certain acts of the defendant village, through its council and officers, who invited and induced the plaintiff's predecessor in title and occupancy, to construct in its streets said railroad, and who consented and acquiesced in the construction and operation of said railway at the time the same was built, and up to about July 1st, 1898.

About July 1st, 1898, the council of said village of Carthage, without authority of law, and without the consent of plaintiff company, passed an ordinance tending to impair the rights of the plaintiff, and threatening to destroy the railway tracks and property of the plaintiff within said village of Carthage.

Plaintiff prays for an injunction to prevent the commission of such threatened acts of violence.

By amendment to the petition facts are set up of proceedings leading up to the sale of the railway property, under a decree in the federal court, under which proceedings it is alleged the property was sold; and it was alleged that by an arrangement, the purchaser, one Kilgour, was to lease a portion and sell the rest of the railway to plaintiff. The title of plaintiff as obtained through and under said decree in the federal court was set up in the amendment to the petition.

By its answer, the defendant village raised the question of corporate capacity in the defendant village to grant an extension of a railway, constructed by a corporation, organized under the act of May 1st, 1852, and of the capacity of the Inclined Plane Company, the former owner of the railway, to accept such a grant, or to make an extension of its lines.

Plaintiff by reply takes issue with the answer as to want of corporate capacity in said village, or in the Inclined Railway Company, to do the acts claimed by the plaintiff company to have been done by them or by it, in extending its tracks as a street railway, or in accepting the same.

The issue thus presented by the pleadings is principally one of corporate capacity, and raises a question of law rather than of fact.

The material facts bearing upon the issue so presented may be summarized as follows:

The Inclined Railway Company was incorporated April 31, 1871, under the act of May 1st, 1852, for the purpose of constructing a railroad, the termini of which were to be in the city of Cincinnati and the village of Avondale, Hamilton county. On February 23d, 1889, the terminus of the road was extended from its northern terminus at the Zoological Garden, in Avondale, to the

village of Glendale, the company constructing an incline from Main street to Locust street on the top of the hill. This was done under an ordinance of the city of Cincinnati, passed June 16th, 1871.

The city of Cincinnati, by ordinance passed December, 1871, granted to the railway company the right to construct a railway from Main to Liberty street, and on Liberty to Walnut street; thence on other designated streets to the foot of the incline. October 2d, 1875, said city granted the company the right for thirty years to occupy with double tracks Locust street, commencing at the top of the incline; thence in a described route to the Zoological Garden.

On March 30th, 1877, the legislature of Ohio passed an act ratifying and validating the grants embraced within the ordinances above referred to. (O. L., vol. 74, page 66.)

In 1885, permission was granted to the Inclined Plane Company by the city of Cincinnati, to use electricity as a motive power in the operation of its road. The county commissioners of Hamilton county, having control over the Carthage turnpike, extending from Ludlow avenue to its northern terminus in the village of Carthage, granted to the Inclined Plane Company the right to construct and maintain an extension of its railway in said pike, in consideration of the company paying into the county treasury on January 1st, 1891, \$500.00, and other designated amounts at fixed periods so long as the pike remained under the control of the commissioners.

The village of Carthage passed a resolution requesting the commissioners to grant the right of way to said Cincinnati Inclined Plane Railway Company to construct an electric street railway over said Carthage pike.

Without going into unnecessary detail as to the various intermediate acts and proceedings touching the title

of plaintiff company, it may be further stated that: On August 7th, 1894, the village council of Carthage regularly passed an ordinance providing for the extension of the Cincinnati Inclined Plane Railway Company from the northern terminus of the Carthage pike over Main street and Lockland avenue to the north corporation line of the village of Carthage. By this ordinance the right to construct the extension to the northern line of the village was provided for.

For the purposes of this opinion, it will not be necessary to refer to the ordinance or its provisions further than to say, the company accepted this grant, and in 1894, constructed the extension to the northern corporation line of said village, and thence northwardly under grants from other municipal authorities to Lockland and Reading; and it paid annually, until the commencement of this action, to the village of Carthage, the sum of \$50, as prescribed in said ordinance.

December 12th, 1890, the city of Cincinnati commenced an action against the Cincinnati Inclined Plane Railway Company, in the superior court of that city, praying, among other things, that the Inclined Plane Railway Company might be enjoined from maintaining more than one track over Auburn avenue, between Mason and Vine streets, and be enjoined from maintaining a track on Main street over what is known as route eight, to Fifth street as described therein.

A decree was entered at the general term of the superior court, finding that said railway company was unlawfully maintaining and operating a street railway by double track, on certain designated streets in said city mentioned in said decree, and perpetually enjoined it from maintaining any of its tracks in Main street, and from maintaining and operating more than one street

railway track on Auburn avenue between Mason and Vine streets.

March 6th, 1895, the Louisville Trust Company (a foreign corporation), commenced an action against the city of Cincinnati in the circuit court of the United States, alleging the execution of a mortgage to it upon this property of the Inclined Plane Railway Company on January 1st, 1889, to secure \$500,000.00 of the bonds of said company, setting forth in its petition the grants by the city to said railway company of privileges, etc., and of the construction by the company of its road, and that the city threatened to remove the tracks of the railway company from the streets, and praying for an injunction to restrain the city from such threatened action.

The city answered, and among other things, set forth all the ordinances that had been passed; and also plead the action of the city in the superior court, and the judgment therein, and the affirmance of the same by the Supreme Court of Ohio.

Such proceedings were had in said action in the United States Circuit Court of Appeals, that it was decreed, that said ordinances were validated by the act of the Legislature of Ohio, of March 30th, 1877, and that the city should be enjoined from interfering with the company in the maintenance and operation of so much of its road, as had been construed under the ordinances of December 1st, 1871, and October 27th, 1875. The decision in this action was affirmed by the Supreme Court of the United States, and remains in full force and effect.

Such proceedings were further had in the trust company's said action, that a decree was entered for the sale of said railway in two divisions: One part being the portion lying south of the Zoological Garden, and the other being that portion lying north of the last named point,

and extending to the villages of Lockland and Reading. Sale was had, and through its agent, one Charles H. Kilgour, the plaintiff company became the purchaser of that part of the road extending from the Zoological Garden northwardly, for \$187,500. The sale was confirmed and proper deeds were executed to said Kilgour, who subsequently conveyed the same to plaintiff company, and it, on June 4th, 1898, entered into possession and commenced the operation of said railway. August 4th, 1898, it commenced this action.

The cause comes into this court on appeal from the common pleas. It has been ably argued on both sides by counsel by briefs as well as by oral arguments. In the short time this court has had to consider the questions involved and to assign reasons for its conclusions, it can not be expected that we will go into much detail in stating our conclusions. Some of our conclusions of law will need be dogmatically stated, for want of time to give reasons therefor.

The first question to which attention will be directed is: What effect had the act of the legislature of Ohio, of March 30th, 1877, toward validating the ordinances of the city of Cincinnati, theretofore passed on June 16th, 1871, December 1st, 1871, and October 27th, 1875, granting to the Cincinnati Inclined Plane Railway Company (which company was organized under the act of May 1st, 1852), the right to construct a railway in certain designated streets in said city, and to occupy for a period of thirty years with double tracks certain streets, and with single track other named streets in said city. This act of the legislature of March 30th, 1877, being an enabling and curative act, is to be construed as such. Its object and purpose was to give power to corporations theretofore as well as those thereafter to be organized under the

act of 1852, the right to hold, lease or purchase, and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane; provided, that no other motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the board of public works in any city having such a board, and the common council or the public authority or company having charge or owning any other highway in which such street railroad may be laid; and, provided, that no inclined plane railway or railroad company shall construct any track or tracks in any street or highway without first obtaining the written consent of a majority of the property holders on the line of such proposed track or tracks, represented by the feet front of lots abutting on the street or highway along which such track or tracks are proposed to be constructed.

No such purchase or lease shall be made without the consent of the holders of the stock in the company purchasing or leasing, and in the company leasing or selling such street railroad or the owners thereof.

It is contended that the legislature could not validate the grants that had been made by the city to the Inclined Plane Company, under the said ordinance of 1871, and 1875, for the reason that the act could not have a retroactive effect. The rule in regard to the effect of curative statutes is,

“If the irregularity consists in doing some act, or doing it in the mode which the Legislature might have authorized or made immaterial by prior law, it may do so by a subsequent one.”

On this principle the legislature may validate contracts made *ultra vires* by municipal corporations. *Sutherland on Statutory Construction*, Section 483.

The most important question to be considered now is: Has the plaintiff company a legal title to the property involved, namely, the line of street railway described in its petition, and the right to maintain, occupy and operate the same?

Under the proceedings in the United States circuit court to which the city of Cincinnati was a party—although the defendant village was not a party—the property, said street railway was sold on foreclosure of mortgages described in that suit, and in which action the validity of the ordinance in question were involved.

The effect of the decree of the superior court, affirmed by the Supreme Court of the state, came under review, and it was in said action held and determined, that the ordinances in question were validated by the act of the legislature of March 30th, 1877; and thereupon it was ordered that the city of Cincinnati be and it was enjoined from interfering with the railway company in the maintenance and operation of its road, and under that decree the property was sold. The purchaser at such sale became and is subrogated to all the rights that the mortgagees had or could have under their mortgages, and the sale so made passes the title of the mortgagor so validated by this decree to the purchaser.

The title of the Inclined Railway Company was directly put in issue by the city in the action of the said, the Louisville Trust Company, in the United States Circuit Court; not only was its title involved, but the city in said action pleaded the judgment of the superior court as affirmed by the Supreme Court of the state of Ohio in support of its contention, as a bar to any inquiry into the

corporate capacity of the railway company to receive or hold these grants. The federal court had jurisdiction of the subject-matter, and of the parties, namely, the city of Cincinnati, the mortgagor, the Inclined Plane Railway Company, and the mortgagee—said trust company—and the validity of the mortgages were necessarily involved, as well as the rights of said mortgagor, the Inclined Plane Railway Company, under said ordinances.

The United States Circuit Court having such jurisdiction, its decree determined and settled the title of the mortgagor, as well as of the mortgagees under their mortgages, and by holding that the judgment of the superior court as affirmed by the Supreme Court, was not conclusive as to the corporate capacity of the Inclined Plane Company to acquire its property, the purchaser at said sale had the right to look to and rely upon the decision of the circuit court as a source of title to the property of the plaintiff. We understand the rule of law to be, that where a party has obtained judgment in his favor, as did the city of Cincinnati, in the superior court, and afterwards becomes a party to another action in which such prior judgment was, or could be pleaded as a bar, but either failed to make the plea, or having made it, the plea was overruled for any reason, and a contrary judgment was entered in the latter case, the last judgment will govern, and the former judgment is, in effect annulled. *Freeman on Judgments* (4th Ed.), Vol. 1, Sec. 332; *Semple v. Wright*, 32 Cal., 659, 669; *Semple v. Ware*, 42 Cal., 619-621.

“Of two decrees rendered by the same court upon the same rights, between the same parties, the latter decree is binding.” *Cooley v. Brayton*, 16 Iowa, 10; *Bateman v. Grand Rapids & I. R. Co.*, 96 Mich., 441.

The plaintiff company having acquired its title under the decree of the United States court, and being in privity with the rights so adjudicated in favor of the mortgagee, it is entitled to be subrogated and to have and enjoy the rights, privileges and powers which were settled and established by that judgment and decree in favor of said Inclined Plane Company through its mortgagees.

"The purchaser at a sale made for the enforcement of a mortgage or other lien, is subrogated to the rights of the original lien holder, even though the proceedings were invalid and his purchase has been avoided. Unless he secures a title under his purchase, the sale is treated as an equitable assignment of the mortgage to him, and his grantee takes the same right."

Sheldon on Subrogation, Section 31, and authorities cited in notes, 5, 6, 7.

In *Brobst v. Brock*, 10 Wallace, 519, at page 534, the court say:

"It is enough that an irregular or void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee as such had. For this authority is hardly needed. We may however, refer to *Gilbert v. Cooley*, Walker's Chancery (Mich.), 494; where it was held that though a statutory foreclosure of a mortgage be irregular, and no bar to the equity of redemption, yet the purchaser at the sale succeeds to all the interests of the mortgagee."

This brings us to the question of the effect of the judgment of the circuit court of the United States, which was affirmed by the Supreme Court, in the case of the Louis-

ville Trust Company, *supra*. The trust company was a foreign corporation, and the city of Cincinnati was a defendant, which gave the circuit court in this state jurisdiction of the action. United States Constitution, Article III, Section 2. The state courts of this state also had jurisdiction to determine the controversy between the trust company and the city of Cincinnati involved in the action. In other words, the circuit court of the United States and the courts of this state had concurrent jurisdiction to determine whether the mortgage of the trust company was valid, and whether the corporate capacity and power of the Inclined Plane Company were extended and validated by the act of the Legislature of March 30th, 1877, and the adjudication of either court would have been conclusive upon the other. The judgment of the Circuit Court of the United States must be given the same force and effect by the courts of this state, as is given to the judgment of the state court. *Crescent City Live Stock Company v. Butcher's Union*, 120 United States, 141; 2 *Black on Judgments*, Section 938.

In the case cited, the court said:

“And their (the judges of the circuit court) judgment or decree when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense either by plea, or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete pro-

tection to all who act in compliance with its mandate."

The plaintiff company having acquired its title under the decree of the United States court, and it being in privity with the rights so adjudicated in favor of the mortgagees, it is entitled to have and to enjoy the rights, privileges and powers which were established by that judgment through the Inclined Plane Company, the mortgagor, and in favor of the Louisville Trust Company, the mortgagee.

The conclusion therefore is, that the plaintiff company has a good title to its right-of-way and the franchises granted by the city of Cincinnati under and by virtue of the ordinances of 1871 and 1875.

The plaintiff company having such title, our next inquiry will be: How, if at all, can the defendant village deprive it of these rights, or prevent the plaintiff from operating or using its road?

The contention is, that the defendant village was not a party to the suit in the United States circuit court, and therefore is not bound by its decree, and that it has the right by ordinance or otherwise, to abate the railway of plaintiff by removing its railway tracks and destroying the same, or, as prayed for in its amended answer and cross-petition, by decree of the court have a mandatory injunction, requiring the plaintiff to remove its rails from the Carthage pike and other streets in the village of Carthage.

This presents two questions:

First. Can the defendant village abate the railroad as a nuisance by ordinance?

Second. Can it abate the railroad by proceedings in equity by injunction?

As to the first proposition. The questions of nuisance or obstruction must be determined by general and fixed rules of law, and it is not to be tolerated that the local municipal authorities of a city can declare any particular business or structure a nuisance in such a summary mode, and enforce its decision at its own pleasure.

By Section 2640, Revised Statutes of Ohio, the council of an incorporated village has the supervision and control of all public highways, streets, etc., within the corporation, and shall cause the same to be kept open and in repair and free from nuisances. But the provision does not authorize a village or city council by mere declaration to determine that a certain structure is a nuisance unless it, in fact, has that character.

Justice Miller in *Yates v. Milwaukee*, 10 Wallace, 497-505, says:

“It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city, or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration, that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself.”

In the process of abating a nuisance there are limitations, both in respect to the agency which may be employed, and as to what may be done in execution of the remedy. The general proposition has been asserted in text books and repeated in judicial opinions, that any person may abate a public nuisance. But the best considered authorities in this country and England hold, that a public nuisance can only be abated by an individual when it obstructs his private rights or interferes at the time with his enjoyment of a right common to many,

as the right of passage upon the public highway, and he thereby sustains a special injury. The public remedy is ordinarily by indictment for the punishment of the offender, wherein, on judgment of conviction, the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed in behalf of the people. The plain reason of the rule is, that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. *Lawton v. Steele*, 119 N. Y., 226; s. c., 16 Am. St. Rep., 813.

Therefore, when the village of Carthage was threatening to destroy the tracks and property of the plaintiff within the village, it gave the plaintiff its right of action against the village, to enjoin it from committing such violence.

Has the village of Carthage the right to resort to its action in equity, as claimed in its cross-petition, namely, for an injunction restraining the plaintiff company from operating its railroad in and through the streets of said defendant village?

It may be stated as a fact, not disputed, that the occupancy of the street and turnpike was not only with the consent of the village, but through its council the road was located, extended and double tracked at its special instance and request; or, in other words, briefly stated, we have a case where a municipal corporation, through its council, invites a company or corporation to come into its corporate limits and to occupy its streets with railroad tracks for the purpose of operating a street railway, and upon such action on the part of the village, the corporation does enter and expends money, equips a line of railroad at great expense, and does other acts and expends large sums of money in equipping its road for use

and operation in connection with its line so constructed, by inducements so held out to it by the village.

After such action on the part of the village, suppose it to have acted irregularly in the matter, so far as its municipal action through its council is concerned, can it afterwards repudiate its action, and by a suit in equity or otherwise, revoke its action and destroy the rights and property so acquired by the railway company? We think not. Coming thus into a court of equity the village must come without fault, and its action must be free from taint.

And this brings us to the consideration of the second proposition that we deem necessary to consider, namely, is the village estopped?

The village of Carthage did more than to stand by and silently see the corporation, the predecessors of the plaintiff in the chain of title, construct a street railroad in and upon its streets. It, by resolution and by solemn acts of its council urged and encouraged it to do so. How can that same village be heard to say that the action of its council was wrong, unauthorized, and that it had no power to give the privileges or make the grants it attempted to do? We think this is a question the village is not in a position to raise in a court of equity. The village is in the same position of a party who stands by and sees a public enterprise, such as a railroad, constructed in its streets at great expense with other valuable interests attached thereto. It is then too late for it, after the enterprise is consummated and large sums of money have been expended on the strength of their action and active encouragement, to seek by injunction or otherwise to deny the right of the company making the improvements or its successors to use the property. *Goodin v. Cincinnati Whitewater Canal Company et al*, 18 Ohio St., 169, 179;

Pennsylvania Company v. Platt et al, 47 Ohio St., 366-381.

In the case of *City Railway v. Citizens Railway*, 166 United States, Justice Brown, at page 566, says:

“All that is necessary to create an estoppel in *pais* is to show that upon the faith of a certain action upon the part of the city, which it had power to take, the company incurred a new liability, as for example, by the negotiation of a new loan and the issue of new bonds and mortgage to secure the same.”

The doctrine of estoppel in *pais* applies the same to municipal corporations as to individuals. *Board of Supervisors Logan Co. v. City of Lincoln*, 81 Ill., 156; *The Union Depot Company v. The City of St. Louis*, 76 Mo., 393; *Grant v. City of Davenport*, 18 Iowa, 180, 187, 188; *The City of Atlanta v. The Gate City Gas and Light Co.*, 71 Ga., 106; *Bigelow on Estoppel*, 376; *Athens v. Georgia R. R. Co.*, 72 Ga., page 80; *Oshkosh Common Council v. State*, 59 Wis., 425; *Chicago & Northwestern R. R. Co. v. People*, 91 Ill., 251; *Rio Grande R. R. Co. v. Bromelle*, 4 Tex., 88; *Herman on Estoppel* (1st Ed.), page 527, Section 563; *Tone v. Columbus*, 39 Ohio St., 281-310; *Lane v. Kennedy et al*, 13 Ohio St., 42-49; *Elster v. Springfield*, 49 Ohio St., page 82-98.

Considerations of public policy as well as recognized principles of justice between parties, require that we should hold in this case that the property of the plaintiff can not be interfered with by the village of Carthage; nor can it now revoke the action of its council whereby it granted the right to occupy its streets for the plaintiff's street railway.

The cross-petition of the defendant village is dismissed and the injunction of the plaintiff is made perpetual; defendant to pay the costs of this action.

ADAMS and DOUGLASS, JJ., concurred.

E. W. Kittredge and John W. Warrington, for plaintiff.

Samuel B. Hammel and John R. Sayler, for defendant.

HISTORY OF SECTION 3439, REVISED STATUTES.

The form of this statute on March 23, 1889, when the Commissioners' grant involved in this case was made, was as follows:

"Sec. 3439. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of Sections 2501 and of 2503 to 2505, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old, or the granting of a new route; provided, that this act shall not apply to any county containing a city of the second grade of the second class."

It remained in the foregoing form until amended by act passed April 9, 1908 (99 O. L., 103). It was amended to read as follows:

"Sec. 3439. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street

or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of sections two thousand five hundred and one and of two thousand five hundred and three to two thousand five hundred and five, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route; provided, however, that when such grant is made by the council of a municipal corporation for the construction of a street railway, either as a new route or as an extension of an existing route, on and along any part of any street or public way upon which a street railway has been operated within one year preceding under a grant or renewal of a grant which has expired or will expire within two years, it shall not be necessary to produce to such council any written consents from the owners of the lots and land abutting on such part of any street or public way; provided the number of tracks on any street, public way or part thereof is not increased beyond the number for which consents were originally obtained."

In the recent recodification of the Ohio Statutes (Feb. 14, 1910), the foregoing section was amended and became Sections 9105 and 9106 of the General Code of Ohio and are as follows:

"Sec. 9105. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of all ordinances of the council relating thereto, have in all respects been com-

plied with, whether the railway proposed is an extension of an old or the granting of a new route.

“Sec. 9106. But when such grant is made by the council of a municipal corporation, either for a new route or as an extension of an existing route, on and along any part of a street or public way upon which a street railway has been operated within one year preceding under a grant or renewal of a grant which has expired or within two years will expire, it shall not be necessary to produce to the council any written consents from the owners of the lots and land abutting on such part of a street or public way; in case the number of tracks thereon or part thereof is not increased beyond the number for which consents originally were obtained.”

It can not be claimed that there was any time limitation upon the power of the County Commissioners to grant a franchise on a public highway under their control unless it be prior to 1883, when Section 3439 referred to 2502, which contained a 25-year limitation upon grants *by municipalities*. The amendment of April 18, 1883, expressly excluded Section 2502 from consideration in connection with commissioners' grants.

Since that time there never has been and there is not now any statute of Ohio which places a time limit upon grants by County Commissioners over public highways under their control.

The decision of the Circuit Court of Logan County in the case of *C., C., C. & St. L. Ry. Co. v. Urbana, B. & N. Ry. Co.*, quoted in the appendix to brief of appellant, page 28, contains the statement that the amendment of April 18, 1883, to Section 3439 was unconstitutional, because it excepted from its operation “any county containing a city of the second grade of the second class.”

It is not clear from the opinion of the circuit court that such a holding was necessary to a decision of the case because the court finally upheld the grant by the City of Urbana to the Street Railway Company which was attacked in that case.

The judgment of the Circuit Court was affirmed without opinion by the Supreme Court of Ohio and it does not appear therefore whether the Supreme Court of Ohio was necessarily passing upon the constitutionality of the amendment of April 18, 1883, to Section 4339 of the Revised Statutes.

But assuming that that case is to be treated as a decision by the circuit court that the amendment in question was unconstitutional; that decision was made in 1903 in a case involving the validity of ordinances passed in 1901 and 1902.

It is not an authority in support of the proposition that the amendment of April 18, 1883, was unconstitutional in the year 1889, when the County Commissioners' grant involved in the case at bar was made, and when legislation of that character was uniformly upheld.

The assertion that the statute in question was unconstitutional is based upon the claim that it is special legislation because it excludes "any county containing a city of the second grade of the second class." But legislation of that character was constantly upheld by the Supreme Court of Ohio long prior to the grant of the County Commissioners of March 23, 1889, and thereafter, up to the decision of the Supreme Court of Ohio in the case of *Hixson v. Burson*, 54 O. S., 470, decided April 20, 1896, when the Supreme Court of Ohio overruled its former decisions upon that point. It has been accordingly held that contracts made on the faith or under the grace of such special legislation prior to the time of such re-

versal (April 20, 1896) will be upheld in spite of the fact that after said date legislation of that character has been held to be invalid.

In *Board of Commissioners of Franklin County v. Gardner Savings Institution*, 119 Federal, 36, the Circuit Court of Appeals for the Sixth Circuit, composed of Judges Lurton, Day and Severens, decided that bonds issued under an act of the Ohio Legislature relating only to Franklin County, said bonds being issued prior to the decision in *Hixson v. Burson*, were valid and binding bonds, although the legislation in question was clearly unconstitutional since the decision in *Hixson v. Burson*. The Court, by Mr. Justice Day, said:

“It is claimed that the act under which the bonds were issued is unconstitutional, as being in contravention of Article XXVI (Article II, Section 26) of the Constitution of Ohio, which provides that all laws of a general nature shall have a uniform operation throughout the state. Since the decision in *Hixson v. Burson*, 54 Ohio St., 470; 43 N. E., 1000, there can be no question as to this law falling within the category of those condemned as attempts to enact special legislation, when general laws having a uniform operation throughout the state can only be passed. *Hixson v. Burson* expressly overruled the prior decision of the Ohio Supreme Court in *State v. Board of Franklin Co. Com'rs*, 35 Ohio St., 459, holding legislation of the character of that now under consideration to be valid. The latter decision was the declared law of the state when these bonds were issued. As late as *Wilkes Co. v. Coler*, 180 U. S., 506, 21 Sup. Ct., 458. 45 L. Ed., 642, Mr. Justice Harlan, speaking for the Supreme Court, said:

“ ‘It is a settled doctrine in this court that the question arising in a suit in a federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and that the rights and obligations of parties accruing under such a state of law would not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation. *Loeb v. Trustees*, 179 U. S., 472, 21 Sup. Ct., 174, 45 L. Ed. 280, and authorities there cited.’

“Up to the time of the issue of these bonds, acts similar to the one under consideration had been upheld by the Supreme Court of Ohio. The fact that the plaintiffs below purchased the bonds after the decision in *Hirson v. Burson* can not affect its title as a *bona fide* holder if the bonds were issued under a law held to be valid at the time of the issue. *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S., 225, 19 Sup. Ct., 390, 43 L. Ed., 689.”

A similar ruling was made by the same court in the case of *Reece v. Olmstead*, 135 Federal, 296, where the history of special legislation in Ohio and its overturn about the year 1896 is set forth fully.

The same view was taken by the Supreme Court of Ohio in *Thomas v. State*, 76 O. S., 341, where the court said that (p. 360)

“the interpretation which is placed upon a constitutional provision by the highest tribunal appointed for that purpose is to be regarded as a part of the provision. In numerous authoritative and well-considered cases this doctrine has been stated in varying terms but to the same import.”

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 226.

THE CITY OF CINCINNATI, APPELLANT,

versus

THE CINCINNATI & HAMILTON TRACTION
COMPANY AND THE OHIO TRACTION
COMPANY, APPELLEES.

State of Ohio *ex rel.* Herman, city solicitor of Dayton, Ohio, *vs.* The Oakwood Street Railway Company, 11 C. C. *N. S.*), 263, cited at page 37 of appellees' brief was a proceeding in *quo warranto* to oust the defendant from its street railway franchise in the city of Dayton, which had been granted July 10, 1891, for fifty years under section 2502 as amended April 24, 1891. This amendment provided that "no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal, except in cities of the second grade of the second class, in which no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than fifty years from the date of such grant or renewal." Dayton was the only city in the State

"of the second grade of the second class." The relator claimed that the amendment was unconstitutional and the franchise invalid. In rendering judgment for defendant the court said:

"It is claimed by the relator that section 2502, as amended April 24, 1891, contravenes the Constitution and therefore the grant of the city, July 10, 1891, to the railway company is invalid. At the time of the amendment Dayton was the only city in the State of the second grade of the second class. The classification by which it was placed in a class by itself was based upon a substantial difference in population, viz., below 30,502 and above 20,000. This court upheld the classification of Dayton in what is known as the crematory case. Its judgment was affirmed by the Supreme Court.

"Our attention has not been called, neither have we been able to find, any other case in which classification as applied to this city has been assailed, and whether it would be upheld when invoked under conditions disclosed in this case it is unnecessary we think for this court to venture an opinion. Upon the point, however, it may not be out of place here to call attention to the expression of the Supreme Court, made since the cases in 66 Ohio State, understood to overthrow the entire doctrine of classification, found in the second syllabus in *Gench vs. State*, 71 Ohio State, 151:

"Within the legitimate purposes of general legislation not relating to the organization of cities and villages a *bona fide* classification on the basis of real and substantial difference in population, and out of conditions growing therefrom, may be valid."

"Whether the section under consideration is repugnant to the Constitution under the 66th Ohio State cases is not the question that must determine the controversy here. A change in judicial opinions respecting the constitutional validity of legislative enactments cannot have retroactive operation upon contracts entered into pursuant to statutory provisions and in reliance upon former adjudications respect-

ing their validity. To give them such operation would violate another provision of the Constitution equal in importance to the one urged here.

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to legislative amendment; that is to say, making it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as on amendments of the law by means of a legislative enactment. *Lewis vs. Auditor Sims*, 61 O. S., 471; *Douglass vs. County of Pike*, 101 U. S., 677."

"So that if, in view of adjudications since the amendment to section 2502, April, 1891, the section is probably unconstitutional, yet as similar laws, including the same or similar constitutional defects, had been judicially determined valid theretofore, and at the time of the grant to the railway company, the subsequent adjudications could not have a retroactive effect upon the grant, because it is a contract founded upon a good consideration. *Shoemaker vs. City of Cincinnati*, 68 O. S., 603.

"In the case of the State, *ex rel. Seymour*, prosecuting attorney, *vs. Gilfillen*, this court held the tax-inquisitor law unconstitutional. 19 Circuit Decisions, 709.

"But we held that rights acquired by the inquisitor by virtue of contracts entered into according to the provisions of said act when that or similar acts were held by the highest court of the State to be constitutional were valid and subsisting rights and could be enforced. This judgment was affirmed by the Supreme Court.

"The ordinance is a contract between the railway company and the city, and hence the controversy here involves the above rule.

"The overthrow of the doctrine of classification in the 66th Ohio State cases necessarily involved in doubt numerous rights acquired by citizens whilst the doctrine was upheld. Whether feared or expected, yet so great was the surprise when it came that a special session of the legislature was deemed imperative and it was called. Rights similar in character to those involved in this case the legislature evidently apprehended would be seriously affected, involved in doubt and become at once a source of serious litigation; and hence it fixed rights arising out of contracts by legislative enactment. To avoid any question as to the rights of parties acquired by contract theretofore it passed a curative act—section 31 of Municipal Code of 1902.

"Whilst we have seen that the relator, under the common law, is not entitled to the decree it prays for here, yet the legislature has wisely removed all doubts that might arise.

"Judgment for defendant."

(30274)

The court referred (p. 361) to an earlier case as recognizing and applying the doctrine "in support of the binding obligation of contracts executed under favor of legislation which this court has previously held to be constitutionally valid, although in the case cited it was admitted to be void under our later decisions."

As late as February 5, 1895, the Supreme Court of Ohio upheld an act of the General Assembly providing for the appointment of jury commissioners in the counties of the state, but excluding certain specified counties.

State v. Kendle, 52 O. S., 346.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 226.

THE CITY OF CINCINNATI, APPELLANT,

versus

THE CINCINNATI & HAMILTON TRACTION
COMPANY ET AL., APPELLEES.

APPENDIX No. 2 FOR THE CITY OF CINCINNATI (THE
INTERURBAN RAILWAY AND TERMINAL COM-
PANY CASE).

THE INTERURBAN RAILWAY & TERMINAL Co. *et al.*

v.

THE CITY OF CINCINNATI.

An ordinance passed by a village council, granting a franchise to an interurban railway company to construct its line through the village, contained the following provision: "Should the village of Pleasant Ridge be annexed to the City of Cincinnati, the rate of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents." The company thereafter duly

accepted the franchise, and constructed, maintained and operated its line thereunder. Subsequently the village was annexed to the city. *Held:* The acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its road thereunder its terms must control.

(No. 14792. Decided November 19, 1915.)

Error to the Court of Appeals of Hamilton County.

The city of Cincinnati brought a proceeding in the common pleas of Hamilton county to enjoin the Interurban Railway and Terminal Company and others from charging passengers on their cars rates of fare in excess of that provided in an ordinance passed by the council of the village of Pleasant Ridge in November, 1901, the village having been subsequently and prior to the commencement of the action annexed to the city of Cincinnati. The Interurban Railway and Terminal Company is a consolidation of other interurban companies including the Rapid Railway Company.

The petition sets out the ordinance passed by the village. It avers that the ordinance was within a short time after its passage in November, 1901, duly accepted by the Rapid Railway Company. The consolidation of the latter company with the interurban company is alleged and that the latter is bound by all of the obligations of the former under and by virtue of the ordinance. From the terms of the ordinance it appears that the Rapid Railway Company had made the lowest bid for carrying passengers within the corporate limits of the village after public notice pursuant to statute. The ordinance fixed a rate of fare for carrying passengers within the corporate limits of the village. It also provided that passengers should be carried from any point on said road within the village of Pleasant Ridge to a terminus at or

near Fountain Square in the city of Cincinnati for continuous ride in either direction, adults seven cents, and contained other provisions as to children and the sale of tickets in larger quantities. The ordinance also contained a provision as follows: "Should the village of Pleasant Ridge be annexed to the city of Cincinnati, the rate of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents and transfers."

It is further averred in the petition that since the annexation of the village to the city the defendant companies have been and are now charging passengers on their railway a fare of seven cents for a ride in either direction between points in said territory formerly constituting the village and the Cincinnati terminus, as well as between any point in said territory and any other point in the city located outside of the territory formerly constituting the village.

Defendant filed its answer, in which it admitted that it is a consolidation of other companies, among which was the Rapid Railway Company, and that by virtue thereof it has been and now is maintaining and operating the interurban railway formerly belonging to the Rapid Railway Company, including the railway along and upon the streets of the village of Pleasant Ridge; that said railway on the streets named in the ordinance set forth in the petition was constructed under and by virtue of said grant and franchise and is now maintained and supported by this defendant thereunder.

The defendant admits that its Cincinnati terminus is on Sycamore street between Fourth and Fifth streets of the city of Cincinnati, and that it is operating passenger cars between said terminus and the territory formerly constituting the village of Pleasant Ridge; but that its line of railway terminates at the south corporation line of the said village of Pleasant Ridge, which is also the north corporation line of the city of Norwood, and that through the city of Norwood and the city of Cincinnati it is not the owner of any line of railway, but operates its cars over the tracks of the Cincin-

nati Street Railway Company now under lease to the Cincinnati Traction Company, under and by virtue of a certain traffic agreement whereby, among other charges which said defendant is required to pay to said companies, it pays three cents for every passenger carried on its cars over any portion of the tracks of said company in the city of Norwood or the city of Cincinnati.

It admits that it has been and is now charging persons on said railway a fare of seven cents for a ride in either direction between points in the village of Pleasant Ridge and the Cincinnati terminus, or any other point in the city of Cincinnati.

The answer further alleges that the provision in said ordinance to the effect that if the village of Pleasant Ridge should be annexed to the city of Cincinnati, the rate of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus should not exceed five cents is invalid, and the said village had no authority to insert said provision in said ordinance; that at the time the said village established a street railway route in said village there was no provision in said resolution or ordinance providing for any rate of fare in the event of the annexation of the village to the city; that after application by the Rapid Railway Company to the village to establish a street railway route and for the right to construct and operate a street railway on and over the Montgomery road from the east to the west corporation line of the village to be operated by electricity, or power other than steam, the village advertised for bids for the construction and operation of said street railroad over said road and in said advertisement stated that the bid should state the rate of fare for passengers on said route; that in none of said proceedings was there any provision respecting the fare to be charged beyond the limits of the village; that on October 15, 1901, it submitted a bid to the village of Pleasant Ridge in response to the advertisement, but said bid did not contain any such provision.

Defendant further says that the village took no action at

any time respecting the rate of fare to be charged in the event of annexation to the city of Cincinnati except in said ordinance of November 19, 1901, and that it had no power to insert said provision in said ordinance. Defendant says that said provision is unreasonable; that a fare of five cents from the corporation line of the village of Pleasant Ridge to the Cincinnati terminus, three cents of which the defendant is required to pay to the Cincinnati Traction Company, will not be sufficient to produce an income to pay operating expenses of this defendant and will destroy its existence.

The plaintiff in its reply denied that the defendant's line terminated at the south corporation line of the village of Pleasant Ridge, which is also the north corporation line of the city of Norwood, and that through the city of Norwood defendant is not the owner of any line of railroad and alleges that the line of the defendant extends beyond the village of Pleasant Ridge through a portion of Norwood. It admits the allegations of the answer with reference to the operations of cars over the tracks of the Cincinnati Street Railway Company and admits that at the time the village established the route there was no provision for any rate of fare in the event of annexation of said village to the city of Cincinnati and the other allegations in the answer in reference thereto.

The minute book of the village of date October 15, 1901, which was introduced by the defendant showed that a communication was received from the Rapid Railway Company submitting bids for rates of fare for passengers over the Montgomery road through the village and to other points, naming them.

The court of common pleas found the issues in favor of the city and entered a decree enjoining the defendant in accordance with the prayer of the petition. On appeal in the court of appeals the defendant sought leave to file an amendment to its answer, alleging the ordinance was unfair, unreasonable and confiscatory; that the two-cent net fare for the district involved did not produce sufficient in-

come to pay the operating expense of the company, would destroy its existence and prevent it from operating any cars whatever on the line, and had already since the execution of the decree of the common pleas court been largely instrumental in forcing the company into the hands of receivers, who now have charge of the property. It was further alleged that the property was thereby confiscated and rendered valueless and taken without due process of law contrary to the provisions of both Federal and State constitutions.

The court of appeals refused leave to file this amended answer and on the final hearing of the case found the issues in favor of the plaintiff and likewise entered a decree enjoining the defendant as prayed for in the petition. This proceeding is brought to reverse the judgments below.

Messrs. Dinsmore & Shohl, for plaintiff in error.

Mr. Walter M. Schoenle and *Mr. Constant Southworth*, for defendant in error.

JOHNSON, J.:

From the above statement it will be seen that the controversy grew out of the provisions contained in the ordinance granting the franchise passed by the village in November, 1901, as follows: "Should the village of Pleasant Ridge be annexed to the city of Cincinnati, the rates of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents and transfers."

It is shown by the record that in September, 1901, the Rapid Railway Company made application to the council of the village for the right to construct and operate a street railway on and over the Montgomery road within the village, and that on the 23d of that month the village advertised for bids for the construction and operation of the road, asking that the bids should state the rates of fare for passengers on that route. The Rapid Railway Company submitted its bid on October 15, and the clause above quoted

was inserted by agreement of the parties at the time the franchise ordinance was passed, and the ordinance was thereafter duly accepted by the company.

The attack upon the judgments below is based upon the claim that the provision of the franchise quoted is without any validity or binding force.

The position of the defendant company substantially is, that the village was wholly without authority to prescribe or contract for fares beyond the municipal limits and that notwithstanding that clause was, by agreement of the parties, included in the ordinance as adopted, which was thereafter accepted by the grantee, and although the line was constructed and operated under and by virtue of the franchise and is now maintained and operated thereunder, nevertheless it is entitled to disregard and eliminate the provision objected to and yet retain and enforce the rights and privileges granted to it by the other terms of the franchise.

For a great many years by consistent statutory provisions the plan of constructing street railways by grants of the municipalities in which they were constructed has been fixed. The procedure has consisted of the establishment of the route by the municipality and the granting of the privilege to the bidder who, after public advertisement, agrees to carry passengers upon the proposed railroad at the lowest rates of fare. It is not contended that any municipality has the power to grant a franchise for a street railway to be constructed and operated entirely within the corporate limits, except in the manner indicated. Street railroads originally used animal power for the movement of their cars. They were designed almost exclusively to furnish facilities for passenger traffic within the limits of the particular municipality. When electric power was applied in street railway operation, it resulted in the extension of street railway lines into suburban districts and between cities and towns. In view of this condition, and in response to the general demand for increased traffic facilities between cities and districts around and about them, the act of May 17, 1894, 91 O. L., 285, now

included in sections 9117 to 9122, General Code, was passed. By the terms of this act authority is given for the construction and operation of electric street railroads upon highways outside of municipalities or on private rights of way. By section 4 of the act authority is given such companies to lease, purchase or make traffic arrangements with any other street railway company as to so much of its track and other property as is necessary or desirable to enable them to enter or pass through a city or village upon the terms and conditions applicable to other street railroads, and by section 6 it is provided that such companies shall be subject to regulations provided for street railroads and have all powers, so far as they are applicable, that other street railway companies possess.

It will be seen that the provisions of the act referred to relate to the construction, maintenance and operation of electric railroads on highways outside of municipalities. Of course the legislature must have contemplated that interurban roads would be projected through municipalities and that it would be impracticable to construct such a road without some means of passing through cities and villages that might be along the route. The statute, therefore, authorized the making of the traffic arrangements referred to with other street railway companies operated within the municipalities. In the event that there was no street railway in the city or village through which the interurban company desired to operate there was no special provision. Section 6 (9122, General Code), however, as pointed out, provided that such company shall be subject to the regulations provided for street railroads and have all powers, in so far as they are applicable, that other street railway companies possess. Therefore the right of an interurban company to extend its line into and through municipal corporations was fixed by the statutes in force prior to the passage of the interurban law referred to. By section 3437, Revised Statutes, now section 9100, General Code, it was provided that "street railways * * * may be constructed

or extended within or without, or partly within or without, any municipal corporation," and section 3438, Revised Statutes, as in force when the ordinance in question was passed, provided that the right to construct or extend such line within or beyond the limits of a municipal corporation could be granted only by the council thereof by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village could be granted only by the county commissioners. The last clauses of the section are: "except, however, in granting permission to extend existing routes in cities of the first, second and third grade, first class, and first grade, second class, such cities and the companies owning such routes shall have the same rights and powers as under existing laws and contracts; and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source other than a municipal corporation shall be made within the limits of such city, except as a new route subject to sections 2501 and 2502, Revised Statutes," which provide for bids, etc.; and section 3439, Revised Statutes, provided for the filing of written consents of more than one-half of the abutting property owners. Section 3443, Revised Statutes, now section 9113, General Code, provides that the "council, or the commissioners, as the case may be, may fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

The foregoing is substantially a statement of the statutory provisions on the subject at the time of the granting of the franchise involved in this suit.

It will be observed that the provisions of section 3438, Revised Statutes, part of which is now section 9104, General Code, relate to the extension of a street railway to be made "within the limits of *such city*." It is well known that as a general proposition street railways are not constructed in villages except for the purpose of interurban traffic, and that the

people in the great majority of villages throughout the State have almost no need for a street railway operated entirely within the limits of their own village. For instance, it is very apparent from this record that the paramount purpose of the village of Pleasant Ridge was to provide interurban service for its residents, as well as that the railroad company entered into the transaction solely to carry out its general interurban plan.

It admits in its answer that it is an interurban electric railway corporation; that the village of Pleasant Ridge is one of the municipal corporations into and through which the Rapid Railway Company constructed, maintained, and operated its interurban electric railway from Cincinnati to the village of Lebanon and that "its railway on the streets named in the ordinance set forth in the petition was constructed under and by virtue of said grant and franchise and is now maintained and operated by this defendant thereunder."

It appears from the record that the Rapid Railway Company had submitted bids for rates of fare through the village over Montgomery road and other points, naming rates and places, including Fountain Square, Cincinnati.

Circumstances and situations of this nature were so general that the legislature contemplated them when it adopted the provisions of the law, including section 9122, General Code, which we have pointed out. The provision is plain that no extension of a street railway located wholly outside of such city, or of one wherever located which is built in pursuance of a right obtained from authority, other than that of a municipal corporation, shall be made within the limits "of such city," except as a new route, but there is no such provision with reference to the extension of a street railway through the limits of a village. It was recognized that such a road might pass for a very short distance through the limits of villages and yet be necessary to the carrying out of the purpose to furnish interurban passenger service to people living in rural districts of the State or in suburban villages in the neighbor-

hood of large centers. It follows that as to villages the construction or extension of an interurban road was then controlled by the general terms of sections 3437 to 3443, Revised Statutes, and that the village council was empowered to grant the right to construct or extend the line within or beyond the limits of the village, and by section 3443 to fix the terms and conditions thereof.

In *Railroad Company vs. Commissioners*, 56 Ohio St., 1, it was held that an ordinance adopted by a city council under section 3438, Revised Statutes, simply confers on a street railroad company the corporate power to extend its road over a State or county road. In the exercise of the power the right to so extend its road can only be acquired by agreement with the commissioners or by condemnation. The court says: "Without such ordinance a company could not extend its road within or without the municipality. As a corporation it has, without the ordinance, no such power."

By the first section of the interurban act of 1894, above referred to, the corporate power is conferred upon companies to construct electric street railroads upon highways outside of municipalities, but the right to extend within or without the municipality must still be secured from the municipality itself.

In the absence of statutory provision to the contrary the village was empowered to stipulate as one of the "terms and conditions" which it was authorized to fix by the provisions of section 3443, Revised Statutes, for a certain rate of fare for a road from any point in its limits to a point outside of its limits. It would not be disputed that the rate of fare to be charged to and from points in the village to points outside is a matter of interest to the municipality and its residents and a proper subject of negotiation with the company in connection with the grant. It was a matter for mutual consideration and agreement between the parties. Therefore, when the grant was made and accepted with the provision as to the fare included, it became one of the considerations of the grant

and one of the elements in the making of the binding contract between the parties. It is familiar law that when the terms of a valid ordinance are accepted by a grantee such action constitutes a contract and the rights of the parties are to be determined by the terms of the contract itself. *Columbus vs. Street Ry. Co.*, 45 Ohio St., 98; *Ry. Co. vs. Village*, 36 Ohio St., 634; *Gas Co. vs. Akron*, 81 Ohio St., 33; *Cleveland vs. Railway Co.*, 194 U. S., 517.

It will be observed that the clause which is here attacked is limited in its application. It is not an attempt to fix fares generally for passengers except in the specific cases provided for. It only affects a ride in either direction between any point *in* the village and the Cincinnati terminus and was not to be effective unless and until the village should be annexed to the city of Cincinnati. The provision does not attempt to fix fares between points in the former village of Pleasant Ridge and Norwood or between any intervening points and Cincinnati or elsewhere.

In other jurisdictions this view of the case has been sustained. In *Rice vs. Detroit Railway Co.*, 122 Mich., 677, the court said: "It is contended that the franchise is in force only within the territorial limits of the village and does not cover territory in other townships. We do not think this contention can be sustained. The franchise is in the nature of a contract and imposes obligations upon the company which those having occasion to ride from Dearborn to Detroit have a right to enforce. The defendant saw fit to contract with the village of Dearborn for a rate outside of the limits of the village. This contract it cannot repudiate."

Like views have been held in *People vs. Railroad*, 178 Ill., 594; *Vining vs. Railway Co.*, 133 Mich., 539; *Selectmen of Westwood vs. Railway Co.*, 209 Mass., 213; *Public Service Commission vs. Railroad*, 206 N. Y., 209.

It is insisted that the enforcement of the terms of the franchise under inquiry here will work hardship and irreparable injury to the company, and cases are cited in support

of the accepted proposition that neither the State nor any of its agencies can, by regulation or legislation, withhold from the owners of the railroad just compensation for its services. But in this case we are dealing with the subject of contract. It implies a meeting of minds. It is much to be regretted if the amount which the interurban company is required to pay to the Cincinnati Company for the use of its tracks is too large a proportion of the fares received, and it is equally to be regretted if the fare provided by the contract itself does not furnish a compensatory return to the company. The presumption is that it was to the interest of the village and to every municipality to provide such a compensation for the services to be rendered by the public utility as will induce the investment of the capital necessary to the furnishing of the service. In fact it may be said that it is the duty of the municipal and other authorities to provide sufficient compensation. It is equally the duty of the company not to contract to perform a service for less compensation than is proper.

But we are not able to see how the court can alter the terms of the contract in this case as the parties made it. The only thing the court can do is to enforce the contract as it finds it, and to hold that as long as the company continues to operate under the franchise it must submit to the terms thereof.

The judgment will be affirmed.

Judgment affirmed.

Donahue, Wanamaker, Jones, and Matthias, JJ., concur.
Nichols, C. J., not participating.

COLUMBUS, OHIO, Jan'y 21, 1916.

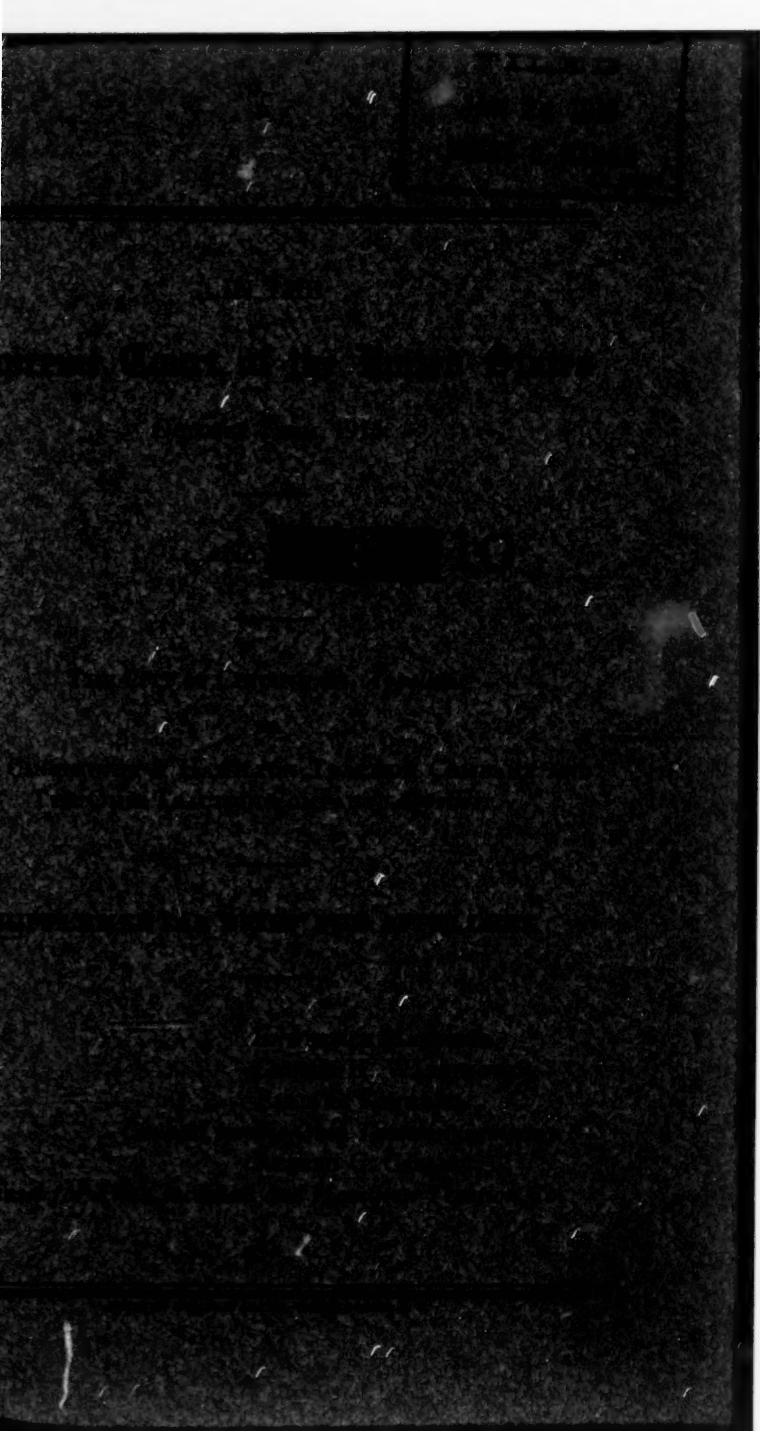
I hereby certify that the foregoing is a true and correct copy of the opinion in case No. 14792, The Interurban Railway & Terminal Co. *et al.* vs. The City of Cincinnati, as the

same is on file in this office; but the same is subject to revision and addition by the judges until published in the official reports.

E. O. RANDALL,
Reporter of the Supreme Court.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/21/16. E. O. R.]

(30268)



IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

No. 226.

THE CITY OF CINCINNATI, *Appellant*,

vs.

THE CINCINNATI & HAMILTON TRACTION COMPANY AND
THE OHIO TRACTION COMPANY, *Appellees*.

SUPPLEMENTAL BRIEF FOR APPELLEES.

Appellees desire to submit a few additional considerations sustaining the federal jurisdiction of this cause.

It is contended by appellant that the Federal Court has no jurisdiction for the reason that Section 5 of the ordinance complained of authorizes the city solicitor to take such legal proceedings as may be proper and necessary to enforce the provisions of this ordinance, or to require the companies to abandon the streets covered by the ordinance; that it follows

that this suit is one to enjoin proceedings against an action in the State Court and, therefore, is in contravention of Section 720 of the Revised Statutes.

The prayer of the bill of complaint is (Rec., p. 6):*

"That the Court decree said ordinance passed April 21, 1914, to be null and void, that the defendant, the City of Cincinnati and its officers, agents and employees, be enjoined by a restraining order, preliminary injunction and final decree from interfering or attempting to interfere, *in any way* with the maintenance and operation, or either, by the plaintiffs, or either of them, of said line of electric street railway, or any part thereof; and from enforcing, or attempting, or taking *any steps to enforce*; the pretended ordinance of the City of Cincinnati, aforesaid, or any part thereof, and from taking any action which would alter, impair, limit or destroy, the right and title of the plaintiff under their said grants and contracts."

The decree (Rec., p. 46) grants the relief in the terms prayed for, and without any particular reference to enjoining the city from bringing other suits, which injunction is included in the general language used.

It is to be noted that the relief sought here is three-fold: a decree (1) declaring said ordinance to be null and void, and (2) enjoining the appellant from interfering in any way with the maintenance by the appellees of their street railway, and (3) enjoining the appellant from enforcing, or taking any steps to enforce, the ordinance complained of.

True, the ordinance attempted to be defended by appellant in this case does, in Section 5, authorize the city solicitor to enforce its terms by proper legal proceedings, and, to that extent, the bill of complaint does seek an injunction

*References in this brief, as in the appellees' principal brief, are to the pages of the printed record, and not to the marginal or original pages. Italics throughout are counsels'.

against legal proceedings. The city does not, however, in this ordinance, or elsewhere, denude itself of its power to enforce the ordinance through the police department, or any other means at hand. There is no presumption that a city, by directing its law officer to take proceedings to enforce an ordinance, abandons all other means within its power which it may lawfully exercise to enforce such ordinance.

Moreover, the ordinance declares the contracts protected by the decree rendered below, void and expired. In this respect the city has completed its legislative act, and the effect of the ordinance has been accomplished to impair the obligation of those contracts, if they do, as the District Court decided, still subsist. The effect of this legislative declaration of the city which, being taken under the authority of State laws, is itself a State law, is to cast a cloud upon the title of the appellees to the property involved in this suit, and so take property of the appellees without due process of law and without compensation.

Section 720 of the Revised Statutes upon which appellant relies, is now Section 265 of the Judicial Code, but reads the same as did Section 720 of the Revised Statutes, at the time the decisions cited by appellant, and by us in this brief, were rendered.

That section is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Counsel for appellant rely, in their application of this section to the destruction of the federal jurisdiction in this case upon, amongst others, the case of

Louisville Trust Co. vs. Cincinnati (76 Fed., 296).

This was a decision in the 6th Circuit, the opinion being rendered by Judge Lurton, and concurred in by Judges Taft and Hammond. This sentence is quoted by appellant in its brief at page 12:

"The remedy by injunction against proceedings in a State court is not permitted under the act of Congress."

The facts in that case are, in brief, that a State court had acquired jurisdiction of the subject-matter of the litigation, before the suit of the Louisville Trust Co. vs. Cincinnati was begun in the Federal Court. It is to such a state of facts that Section 265 of the Judicial Code applies. The section is designed to protect the jurisdiction of the State court once acquired against obstruction or interference by injunctions from the Federal Courts. Its purpose is to promote and not to limit original jurisdiction. An action once begun can not be stayed, but an injunction against instituting an action is not not staying a suit, for only a suit already begun can be stayed.

This case may be well compared with that of

Iron Mountain R. Company vs. City of Memphis,
(96 Fed., 113)

decided by the same circuit, Taft and Lurton, Circuit Judges and Clark, District Judge sitting, the opinion being by Judge Taft. That case is pertinent to many of the issues in the case at bar, and we quote from it *in extenso*:

"We come now, however, to a much more difficult question, which arises on the appeal of the complainant below, the railroad company. The Court below held that there was no jurisdiction under the bill, except that which arose out of the threatened taking pos-

session of the street, and ousting the railroad company therefrom by force, without due process of law. It enjoined the city only from taking forcible possession of the street. This injunction might properly have been founded on the relative situations of the parties as they were admitted to be. The fact that the railroad company was in possession of the street, gained lawfully, and that the city could not rightly enforce a forfeiture without judicial proceedings, was a sufficient ground for granting the injunction which the Court below granted; and it became immaterial, therefore, in furnishing this remedy, whether the railroad company had violated a condition forfeiting its estate. If the threatened use of the police to enforce the resolution of forfeiture was essential to the federal jurisdiction, then it would seem that the order of the Court below disposed of the entire controversy before it. If, however, the resolution of the legislative council was a law of the State regulating interstate commerce, or was a law of the State impairing the obligation of contracts, or depriving a person of its property without due process of law, then the complainant could invoke the jurisdiction of the Court below to enjoin its enforcement, *without regard to the method by which it was proposed to carry it into effect.* * * *

"We come, then, to the question: Did this resolution violate that part of Section 10, Art. 1, of the Constitution of the United States, declaring that 'no State shall * * * pass any * * * law impairing the obligation of contracts'?

"First. Was the resolution a law of the State within the meaning of this clause? It has frequently been decided that, where a municipal council passes an ordinance in pursuance of authority vested in it by the State legislature, which is legislative in its character, and which is merely the exercise of delegated power to make laws that the legislature might have made directly, such an ordinance is a law within the inhibition of the Constitution if it impairs the obligation of a contract. *Murray vs. Charleston*, 96 U. S., 432;

U. S. vs. New Orleans, 98 U. S., 381, 392; Meriwether vs. Garrett, 102 U. S., 472; Waterworks Co. vs. Rivers, 115 U. S., 674, 6 Sup. Ct., 273; City of Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 19 Sup. Ct., 77. If such ordinance is administrative, rather than legislative, then it is not within the constitutional inhibition, even though it impairs the obligation of a contract. New Orleans Waterworks Co. vs. Louisiana Sugar Refining Co., 125 U. S., 18, 8 Sup. Ct., 741. The resolution in the case before us is admitted to have been passed with all the forms required, and by the vote necessary to enact an ordinance. It concerned the occupancy of the streets, which, as we have seen, the legislative council controls under delegated authority from the State Legislature, as an agency of the State and a trustee for the public at large. It purported to find and adjudged the ground to exist for declaring a forfeiture of a grant of an easement and a franchise in the streets which the legislative council as the agent of the State had made, and it exercised the option reserved to it in the grant of insisting upon such grounds as a forfeiture unless the grantee within 50 days should change its course of conduct. It is conceded that the grantee did not change its course of conduct, and that the resolution has become operative by its terms, if it can have any efficacy to effect a divestiture of title. Where the sovereign makes a grant upon condition subsequent, the breach of the condition does not of itself divest title and right of possession, but the power is in the sovereign, as grantor, to manifest his will that the condition shall be enforced, and this manifestation of his will is by legislative action. In this case the condition expressly requires that the council should exercise an option before forfeiture should ensue. In exercising such an option, the council is acting in a legislative capacity. * * *

"In U. S. vs. Repentigny, 5 Wall., 211, 268. it was said, 'The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of

the Government.' See, also, *Farnsworth vs. Railroad Company*, 92 U. S., 49, 66; *Van Wyck vs. Knevals*, 106 U. S., 360, 368, 1 Sup., 336; *Railroad Company vs. Mingus*, 165 U. S., 413, 17 Sup., 348. An examination of these cases makes it entirely clear that a declaration of a forfeiture of a public grant for condition broken is legislative in its character. It is not conclusive, of course, of the fact asserted, and may be judicially resisted (see *Railroad Co. vs. Mingus*, 165 U. S., 413, 434, 17 Sup., 348); but, if the condition in fact has been broken, it operates to divest the title and the right of possession. The resolution in question was a declaration enacted in form of law by the legislative council, a State agency, vested with legislative authority over the streets, by which, if valid, the title of the city and State and public in the street granted to the complainant was divested from it, and revested in the grantors. Clearly, the resolution was and is a law of the State within the meaning of the Constitution. It is contended that it can not be a law, because it does not declare a present forfeiture, but only a future one, contingent on conduct of the grantee. We do not think this feature of the resolution deprives it of its legislative character. The operation of laws is frequently postponed to a future day, and made to depend on a contingency. When, as is conceded in the present case, the time of suspension is past, and the contingency has happened, they are as efficacious as if they had contained no conditions. This resolution found and adjudged a condition to be broken, and declared that the council exercised its option to declare a forfeiture and to resume possession if the breach continued 50 days. The conduct declared by the council to be a breach, it is conceded, has continued, and the declaration of forfeiture has become operative. * * *

"It may be doubted whether a mere declaration of forfeiture, when the condition is not broken, not followed by forcible taking possession, is a breach of the contract and grant. It forms a cloud upon the gran-

tee's title, but does it break any covenant in the grant? It is not necessary to discuss this question, because it is immaterial whether it is a breach of the contract or not. It impairs the obligation of a contract if it purports *by force of law to authorize* any one to do that which would be a breach of the contract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and right of possession in the city, it authorizes the city officers peaceably to take possession of the street, and to take up the tracks, and would *doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them.* * * *

"It is unnecessary for us to discuss at length the reasons for holding that the resolution was a law depriving the complainant of its property without due process of law, if, in fact, the condition had not been broken, for they are substantially the same as those just stated for concluding that the resolution is a law of the State impairing the obligation of a contract. If this resolution violates the Federal Constitution, there can be no doubt that complainant is entitled to equitable relief. *It is certainly a cloud upon the title of the railroad company in its occupancy of the street, which it may ask a court of equity to remove, and to enjoin any claim under it.* We conclude, therefore, that the bill stated a good cause of action on the ground that the resolution of the city of March 25, 1898, impaired the obligation of the contract under which the railroad company occupied Kentucky Avenue, if it be true, as averred in the bill, that no condition of the contract had been broken justifying forfeiture. This gave to the court below jurisdiction of the whole controversy between the city and the railroad company; and, inasmuch as the suit had been brought a considerable time before the State suits were brought it justified and required the court below to enjoin the suits in the State court as an impairment of its jurisdiction over the controversy with which it had been invested by the filing of the bill. That such a remedy is not

in conflict with Section 720 of the Revised Statutes forbidding the Federal Courts to issue injunctions against proceedings in a State Court, is abundantly established by authority. *French vs. Hay*, 22 Wall., 250-253; *Dietzsch vs. Huidekoper*, 103 U. S., 494-498; *Fisk vs. Railroad Company*, 10 Blatchf., 518, 9 Fed. Cases, 167; *Union Mutual Life Insurance Company vs. University of Chicago*, 6 Fed., 443; *Sharron vs. Terry*, 36 Fed., 337; *Garner vs. Bank*, 16 C. C. A., 86, 67 Fed., 833."

Counsel for appellant further cite in support of their attack upon the Federal jurisdiction the case of

Mallinckrodt Works vs. City of St. Louis (238 U. S., 41), syllabus 4.

Neither in this paragraph of the head note, or syllabus referred to, nor in the opinion in that case, do we find any-thing relating to this question.

In the brief of counsel for appellant is also cited upon the same proposition the case of

Minder vs. Georgia (183 U. S., 559)

and a quotation is given from the opinion of Mr. Chief Justice Fuller, which is to the effect that the requirements of the fourteenth amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State, and if the laws operate on all persons alike, and do not subject the individual to the arbitrary exercise of the powers of government; and

Barney vs. City of New York (193 U. S., 430)

is also cited to the same effect. Neither of these cases have any relation to the subject with reference to which they are cited.

Counsel for appellant also rely upon, and quote from the case of

*Seattle Electric Company vs. Seattle R. & S. Ry.
Co.* (185 Fed., 365).

This decision was rendered in the Circuit Court of Appeals for the Ninth Circuit. The appellee had a certain street railway franchise which by its own terms was not exclusive; thereafter the city of Seattle granted appellant a street railway franchise over the same, or part of the same route, and in this later grant specially provided that

"Before any railway tracks shall be laid in any street, or portion of a street, in any location where any person or company entitled to compensation for damages occasioned thereby, all injuries or damages to be occasioned thereby shall be ascertained and settled by the grantee, its successors or assigns, according to law."

Appellee brought suit in the Federal Court claiming that operation by the appellant under its later franchise would do irreparable damage and invoked the constitutional provision against the impairment by the State of the privileges or immunities of the citizens of the United States, and against any State depriving any person of life, liberty or property, without due process of law. The Court of Appeals found that there was in fact no Federal question. That the question was made in words in the bill but did not appear to be real, that there was ample protection afforded by the State through the city ordinance of Seattle to appellant's property, in the provision made in the ordinance for compensation for any injuries or damages occasioned before occupancy of the streets by the new grantee; that there was every presumption that such damages would be justly assessed by the State courts, and that therefore the bill, not presenting any Federal question, the injunction al-

lowed below should be vacated, and the bill dismissed. This case completely fails of supporting the contention of appellant in the case at bar.

Respectfully submitted,

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Office Supreme Court, U. S.

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Supreme Court of the United States

No. [REDACTED] October Term, 1914.

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THE CITY OF CINCINNATI,

Appellant,

V07922

THE CINCINNATI & HAMILTON TRACTION
COMPANY et al,

Appellees.

Appeal from the District Court of the United States, for the Southern
District of Ohio.

Brief for the City of Cincinnati, Appellant.

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Supreme Court of the United States

No. 600. OCTOBER TERM, 1914.

(24344)

THE CITY OF CINCINNATI,

Appellant,

vs.

*THE CINCINNATI & HAMILTON TRACTION
COMPANY et al,*

Appellees.

Appeal from the District Court of the United States, for the
Southern District of Ohio.

Brief for the City of Cincinnati, Appellant.

STATEMENT OF THE CASE.

On the bill of complaint of the Cincinnati & Hamilton Traction Company, an Ohio corporation, and owner of an electric street railway running north of the Zoological Garden over a road known as the Carthage Pike, and the Ohio Traction Company, an Ohio corporation, lessee of and operating said line, the City of Cincinnati was enjoined from proceeding in the state courts to enforce an ordinance passed April 21, 1914 (Transcript of Record, hereinafter referred to as "R," page 27).

For brevity the two companies will be referred to as the "Traction Companies," excepting where a more particular reference is required.

The line of street railway in question is shown on the plat attached to this brief, which is a copy of Exhibit "A" found in the Record as the second plat following page 270 (offered in evidence, R. 59). The line from the Zoo to the present north corporation limits (at Wyoming) being the top of said plat Exhibit "A." is about six miles long (see figures on Plat "A"), and is a double track street car line most of the distance. At the fork of the road on the top part of the plat in the former Village of Carthage is a building known as the "Gas Hall." This is an old land-mark and is referred to by that name repeatedly in the record.

Very briefly the City's claim is that the grant of the former Village of Carthage (now part of Cincinnati) from Gas Hall to its former south boundary expired March 19, 1914, by virtue of the twenty-five year limitation in the Statutes of Ohio; that the grants to the north of this section expired at the same time because grants of extensions can not exceed the life of the parent line unless so expressed; that the Traction Companies have no franchise at all to operate over Erkenbrecher Avenue between Vine Street and Carthage Pike and particularly no right to operate over that portion within the red lines on the inset map at the bottom of Exhibit "A," and that the Traction Companies have no franchise at all to operate their tracks on the east half of the Springfield Pike (now sometimes called the Carthage Pike) on the west side of the former Village of Hartwell, now a part of Cincinnati (see upper left-hand part of Exhibit "A").

CITY LIMITS.—At the time of the original grants in question in 1889 the north corporation line of Cincinnati was the south line of Section 15, and is so shown on the bottom of the plat Exhibit "A." It also so appears

on the plat of the Zoological Land Syndicate Subdivision, Exhibit "I" (R. 278). Subsequently the City limits were extended northwardly to the south line of the Village of St. Bernard, being at Mitchell Avenue on the east side of the Carthage Pike. By subsequent annexations the City limits were extended so as to include the former Villages of Carthage and Hartwell. The Villages of St. Bernard and Elmwood Place still retain their independent corporate existence, the latter, however, was not incorporated until May 17, 1890.

RECORD.—The opinion of the trial court is found on pages 29 and following of the Record. The evidence below was almost entirely confined to record evidence. The small portion of testimony taken was by the trial court ordered reproduced in full (R. 49). In the original transcript of evidence on account of the offering in evidence of the printed records in the prior cases there was a considerable duplication of exhibits. These have been omitted in the printed record in this court so far as possible. The memorandum of the omissions is found in the Record at page 314, and following. These omissions are only of duplications.

OHIO STATUTES.—These are printed in full in the appendix to this brief.

SPECIFICATION OF ERRORS RELIED ON.

The assignments of error are found in the Record at page 42 on all of which the City relies. But because of the fact that the errors are particularly assigned to the different sections of the road, and because of the fact that the principles of estoppel and adjudication and source of grant, must be considered in connection with several of these sections, we group the assignments of errors as

given below. This we believe to be the simplest way to impart a summary view of the propositions set out in the brief. While all these propositions are here treated with reference to the sections south of the Gas Hall, they are also applicable to the track on the east half of Springfield Pike, excepting that there no adjudication is claimed by appellee.

THE COURT BELOW ERRED PRINCIPALLY in the following particulars (see Opinion, R. 29, and following):

FIRST.—The court erred in holding that it had jurisdiction notwithstanding there existed no diverse citizenship and notwithstanding that the legislation claimed to be unconstitutional provided for its enforcement through the courts: Assignments of error 1 and 3 (R. 42 and 43); and that the suit was not premature: Assignment 23 (R. 45).

SECOND.—The trial court overlooked the fact that even if a franchise by estoppel could be created, which we deny, nevertheless, no franchise by estoppel, *or otherwise*, can exceed the twenty-five year limit imposed by the State law. This is shown by the very cases cited by the court (R. 39). *The twenty-five years have expired*. Assignments of Error 17, 18, 6, 5, 4, 13 (R. 43, 44).

THIRD.—The court erred in decreeing that the adjudication in the quo warranto suit established (R. 45) the *perpetual right* to operate a street railroad on Carthage Pike to Gas Hall. It is here sufficient to observe that a quo warranto proceeding in Ohio, as in most states, simply raises the question of *present* right and does not attempt to determine the length of a grant. Further, we have the fact that at the time of the decision in the quo warranto case, the admitted grants of the Village of Carthage had not expired. Assignments of Error 8, 7 (R. 113).

FOURTH.—The court erred in holding that street railway grants by the County Commissioners are good

within the limits of a city or village without action by the municipal authorities, contrary to the Ohio law: Assignments of Error 9, 10 (R. 43, 44), and for more than twenty-five years, Assignments 14, 15, 16 (R. 44).

FIFTH.—The court erred in holding that extensions of a line are not limited in life to the term of the parent line. Assignments of Error 11 (R. 44).

SIXTH.—In not holding to be valid the ordinance of April 21, 1914. Assignments 2, 3, 19, 21, 22, 24, 12, 20 (R. 43, 45).

HISTORICAL RESUME.—The original holder of the street railway franchise from Fountain Square, formerly called the Fifth Street Market Place, to Gas Hall (not referring at the present to certain invalid links of the chain), was the old Cincinnati Inclined Plane Railway Company. For the present purposes a sufficiently accurate history of the franchises acquired by this company and the vicissitudes of the company itself is found in the pleadings in the Louisville Trust Company case (R. 232) beginning with the fifth paragraph of the bill and following through the intervening petition and answer; and also in the second defense in the answer of the Cincinnati Street Railway Company (R. 183), which later acquired its franchises south of the Zoo.

The down-town portion of this line appears on the plat opposite page 168 of the Record and a rough map of the entire line of the Cincinnati Inclined Plane Railway is found opposite page 172 of the Record.

Briefly the Cincinnati Inclined Plane Railway then had its line from Fountain Square in Cincinnati over the Incline, out Auburn Avenue and Vine Street to the Zoo, thence over Erkenbrecher Avenue and Carthage Pike to Gas Hall, in operation as early as 1889 (R. 244).

In a foreclosure case in the United States Court, known as the case of the *Louisville Trust Company v. Cincinnati Inclined Plane Railway Company*, No. 4859, United States Circuit Court for the Southern District of Ohio, this line was sold to Charles H. Kilgour, who conveyed the part north of the city to the Millcreek Valley Street Railway Company, the predecessor in title of the appellees, and the part within the City to the Cincinnati Street Railway Company, subject, however, to a lease to the Millcreek Valley Street Railway Company as far north as Mitchell Avenue. But more of this case below.

The chain of title of appellees (so to speak) is found in the bill (R. 2). See also R. 50.

THE GRANTS INVOLVED.—Commencing at the Zoo there is no grant for the line over Vine Street and Erkenbrecher Avenue within the red lines on the inset map on said Exhibit "A," which is also attached to this brief. Over the remainder of the distance on Erkenbrecher Avenue to Carthage Pike the company relies on the consent of the Zoological Land Syndicate (R. 126) *There is no grant from the City.*

On March 19, 1889, the Village of Carthage granted (Exhibit "D," R. 16) to the company a franchise from its then southern limits to Gas Hall. On March 23rd of the same year the County Commissioners granted the right to "use and occupy * * * the Carthage Turnpike, from Ludlow Avenue" (which is the name of Erkenbrecher Avenue beyond its intersection) "to the northern terminus of the Pike, at or near the County Fair Grounds at Carthage" (R. 14). We are not interested in the grants by the Village of St. Bernard (Feb. 5, 1889, R. 198), and Elmwood Place (Sept. 21, 1890, R. 199).

On August 7, 1894, the Village of Carthage granted the Inclined Plane Railway Company the right to "extend"

its tracks from Gas Hall to its north corporation line (Exhibit "E," R. 17). Thereafter "*extensions*" were granted into the Village of Hartwell by ordinance, September 16, 1896 (Exhibit "F," R. 19). This first extension was along Wayne Avenue, being the east side of the fork. The extension over Rural Avenue, now Woodbine, and Decamp Avenues, westwardly to the old Springfield Pike, now also called Carthage Pike, was granted by ordinance of May 14, 1900 (Exhibit "G," R. 22). The extension along the old Springfield Pike, north of Decamp Avenue of 4400 feet is by double track, one track being in the main to the west of the section line (which is also the western boundary of the former Village of Hartwell and now the western boundary at that point of the City of Cincinnati), and the other track being in the main east of that line. There is no franchise from Cincinnati or from Hartwell in the Record for this 4400 feet. The company relies on the contract with the old Hamilton, Springfield & Carthage Turnpike Company of March 19, 1895 (R. 259), which was *never recorded*, and a grant from the County Commissioners of March 14, 1900 (R. 263).

THE EXPIRATION OF THE FORMER FRANCHISES.

THE CINCINNATI ORDINANCE OF APRIL 21,
1914.

It is not denied that at all the times mentioned in the case at bar the Ohio statutes forbade cities and villages granting street railway franchises for more than twenty-five years.

Section 2502, Revised Statutes of Ohio of 1880 (now Section 3771 of the General Code of Ohio):

"* * * provided that no grant, nor renewal of any grant for the construction or

operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal"

All of the grants in question were made without an expressed limitation in time. It is plain, therefore, that so far as the grants by the villages were concerned, the statute automatically limited them to twenty-five years. This is so, although such grants could be sooner terminated:

East Ohio Gas Co. v. City of Akron, 81 O. St., 33 (1909):

"Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto"
(Syl. 4.)

See also cases cited on p. 44 hereof.

THE ORDINANCE OF APRIL 21, 1914.—The franchise for Carthage south of Gas Hall (Exhibit "D," R. 16) having been passed March 19, 1889, clearly expired by limitation, on March 19, 1914.

We thus have by the expiration of this franchise a break of 4,350 feet (see Exhibit "A") in the Traction Company's line, over which they have no franchise. At this point we confine ourselves to this one link in the line. The other links will be set out more at length below.

The City thereupon passed the ordinance of April 21, 1914 (R. 7 to 9). This ordinance recites the companies' want of franchises, and provides that if they still continue to operate over the portions of the line where it has no franchise, they must do so in accordance with the terms of the ordinance, the principal provision being for a five-cent fare to Fountain Square.

I.

THE FEDERAL COURT HAS NO JURISDICTION.

The ordinance of April 21, 1914, provides in part:

"Sec. 5. In case the Cincinnati & Hamilton Traction Company and the Ohio Traction Company, or either of them, refuse or fail to comply with the terms of this ordinance upon the taking effect hereof, the City Solicitor shall be, and he is hereby authorized and directed *to take such legal proceedings* as may be proper and necessary to enforce the provisions of this ordinance, or to require the said companies and each of them to abandon the streets covered by this ordinance, and to remove their tracks from said streets."

The ordinance provides that the invalidity of one section shall not render the whole invalid.

In *Home Telephone Co. v. Los Angeles*, 211 U. S., 265, this court held that "the rule that every presumption is in favor of the validity of legislation applies to a city ordinance * * *." (Part of Clause 8 of syllabus.)

NO QUESTION IS INVOLVED IN THE CASE AT BAR OF THE REASONABLENESS OF THE FIVE-CENT FARE RATE. There is no showing in the record that the five-cent fare will not pay handsome dividends on the investment. On the contrary no license fee nor percentage on gross earnings is imposed over and above that of the prior ordinance which only amount to about \$200 per year; a mere pittance. In the Detroit case, 229 U. S., 42, a day by day ordinance was sustained (on which that at bar was modeled, which required "the payment of \$200 *a day* to the city," as well as a percentage on the gross receipts and certain unpaid payments

due. See for the Detroit ordinance at greater length, 172 Michigan, 144.

The failure of the Traction Companies to offer evidence of unreasonableness is conclusive against them on this point.

Des Moines Gas Co. v. Des Moines, 238 U. S., 153, syl. 1.

THE FUNDAMENTAL PROPOSITION WHICH THE CINCINNATI ORDINANCE IS FRAMED TO EXPRESS, is that on those portions of the line where there is now no franchise, the Traction Companies shall not operate excepting on the terms prescribed in the ordinance. As this court said in *Detroit United Railroad v. Detroit*, 229 U. S., 39, "the railway took the several grants with knowledge of their duration * * * the rights of the parties were thus fixed and can not be enlarged by implication" (p. 45). The case is not different from that of a man who has erected a building not only on the land he owns but also on land adjoining which he holds under lease. At the expiration of this lease he must either pay the price demanded or get off. Whether the price demanded is large or small, no right under the Federal Constitution is impaired.

It is at once apparent that the foregoing Section 5 of the ordinance attacked requires a resort to a court. No force of arms is contemplated. The only person authorized to act is the City Solicitor and he is authorized only to "take such legal proceedings as may be proper."

THUS THE CASE AT BAR IS AN IMPROPER ATTEMPT TO ENJOIN A RESORT TO THE STATE COURTS.

The plea to the jurisdiction is made in the first paragraph of the answer of the City (R. 9). There can be no taking of property without due process of law, when

the very legislation itself provides for a resort to the court.

In *Minder v. Georgia*, 183 U. S., 559, Mr. Chief Justice Fuller said:

“Requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of Government.” (p. 562.)

Barney v. City of New York, 193 U. S., 430.

Again, the City's answer (R. 13) expressly “denies that under the authority of said ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs or either of them, of said electric street railway, or cause any damage or injury of any kind to plaintiffs, or either of them, and defendant avers that the enforcement of said ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction first had and obtained, and after a hearing on due and reasonable notice to all interested parties.”

This denial, and the total absence of proof or suspicion to the contrary, is conclusive.

Seattle Elec. Co. v. Seattle R. & S. Ry., 185 Fed., 365:

“The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its Constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States.” (p. 372.)

In *Louisville Trust Co. v. Cincinnati*, 76 Fed., 296, C. C. A., Sixth Circuit, Mr. Justice Lurton, with whom Circuit Judges Taft and Hammond were then sitting, said:

"The remedy by injunction against proceedings in a state court is not permitted under the act of Congress." (p. 317.)

In *Defiance Water Co. v. Defiance*, 191 U. S., 184, Mr. Justice Fuller said:

"Ordinarily the question of the repugnancy of a state statute to the *impairment clause* of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require, *Chicago & Alton Railroad Co. v. Wiggins Ferry Co.*, 108 U. S., 18; and if there be ground for complaint of their decision, the remedy is by writ of error under Section 709 of the Revised Statutes." (p. 191.)

"We regard this bill as an attempt to evade the discrimination between suits between citizens of the same state and suits between citizens of different states, * * * and are of opinion that it should have been dismissed for want of jurisdiction." (p. 194.)

A constitutional construction of the ordinance by the state will be presumed.

Mallinckrodt Works v. St. Louis, 238 U. S., 41, syl. 4.

We further call to the court's attention the fact that the bill in the case at bar was filed April 27, 1914, six days after the passage of the ordinance. Under the INITIATIVE AND REFERENDUM LAW for cities (103 O. L., 211, 212) this ordinance could not take effect

unless approved by the Mayor, and then only thirty days after the date it was filed with him. The ordinance was filed with the Mayor April 24, and approved on April 27 (R. 13). This suit was, therefore, premature.

Elkins v. City of Chicago, 119 Fed., 957, Syl. 2.

State, ex rel Schreiber, v. Milroy, 88 O. St., 301.

II.

THE CARTHAGE GRANT SOUTH OF GAS HALL.

The application of the Cincinnati Inclined Plane Railway Company to the then Village of Carthage "for permission to occupy and operate its railway through your village * * *" was made under date of January 28, 1889 (R. 166). Thereafter the grant was made by the Village of Carthage on March 19, 1889 (R. 16, 17, 275). It recites the application of the Cincinnati Inclined Plane Railway Company for permission to occupy Carthage Pike and to operate its said electric road over the same through the Village of Carthage, and then provides for the manner of construction of the street railroad, the time at which it must be completed, and provides—

"6th. Said grant to be accepted in writing within thirty days of the passage of this resolution * * *." (R. 17.)

This grant was amended April 16, 1889 (R. 276). Thereupon the following acceptance was filed (R. 277):

"CINCINNATI, OHIO, April 16, 1889.

"TO THE COUNCIL OF THE VILLAGE OF CARTHAGE:

"*Gentlemen:* The Cincinnati Inclined Plane Railway Company hereby *accepts the grant* made to it by your Honorable Body on the 20th day of March, 1889, and amended on the 16th

day of April, 1889, giving it the right-of-way to occupy with double or single tracks, with the necessary turnouts, and with the necessary appendages and appurtenances of an overhead Electric Street Railroad system, the Carthage Turnpike, and either of the roads leading to the Carthage Fair Grounds, and to operate its said electric road over and along the same, upon the terms and conditions therein stated.

"IN WITNESS WHEREOF, the said Cincinnati Inclined Plane Railway Company has hereunto caused its corporate name and seal to be affixed by J. M. Doherty, its Secretary, this 16th day of April, 1889.

"(Signed) CINCINNATI INCLINED PLANE RY. CO.,

"H. H. LITTLE, *Pres.*

"(Signed "J. M. DOHERTY, *Secretary.*"

The foregoing documents show a complete franchise grant. In accordance with Section 2502, Revised Statutes, this grant expired by limitation in twenty-five years, to-wit: on March 19, 1914, or if we take the date of the amendment and acceptance, April 16, 1914. Both dates were before the passage of the Cincinnati ordinance in question. We thus have one link in the Traction Company's chain gone. This is enough to sustain the validity of the ordinance.

It makes no difference whether Council's action be denominated "ordinance" or "resolution."

Kerlin Bros. v. Toledo, 20 Ohio Cir. Ct., 603.

Blanchard v. Bissell, 11 O. S., 96, 101.

America, etc., Co. v. Astoria, 218 Fed., 480.

THE GRANTS TO OPERATE A STREET RAILWAY WITHIN A CITY OR VILLAGE CAN BE GRANTED ONLY BY THE COUNCIL THEREOF AND CAN NOT BE GRANTED BY THE COUNTY COMMISSIONERS.

The street railway statutes as they existed in 1889 are set out at large in the appendix to this brief. A succinct summary of the legislation in Ohio as to street railways from its beginning is found in *C., C., C. & St. L. Ry. Co. v. Urbana, B. & N. Ry. Co.*, 5 Ohio Circuit Court (N. S.), 583; affirmed, 73 Ohio St., 364; commencing with page 590 at the bottom. A considerable extract from this case containing the said summary is found in the appendix.

Section 2501, Revised Statutes of Ohio, provides that:

"No corporation, individual or individuals, shall perform any work in the construction of a street railroad until application for leave is made to the council, in writing, and council, by ordinance, shall have granted permission, and prescribed the terms and conditions * * *."

Section 2502 provides for a public notice of the application and for the limitation for the acquisition of consents of the property owners abutting on the line and limiting the power to grant to twenty-five years, and forbids any release of the grantee from any obligations during the term of said grant.

Section 2505 of the Revised Statutes of Ohio provides that the

"Council of any city or village may grant permission, by ordinance, to any corporation, individual or company, owning or having the right to construct, any street railroad, to extend their track * * * and when any such extension is made the charge for carrying passengers on any street railroad so extended * *

* shall not be increased by reason of such extension or consolidation."

Section 3438, Revised Statutes of Ohio, being found in the chapter as to private corporations, provides that:

"The right so to construct or extend such railway within or beyond the limits of a municipal corporation can be granted only by the council thereof, by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village can be granted only by the county commissioners, by order entered upon their journal."

The section concludes with a provision against the release of the grantee during the term of the grant from any obligations assumed.

Section 3439 requires the consents of abutting property owners, and Section 3440 provides for the appropriating of property when the owner fails to waive his claim for damages.

Section 3441: "If the public road along which the railway is to be constructed is *owned* by any person or company, or is within the *control or management* of the Board of Public Works or other public officer, such person, company or officer may agree with the person or company constructing the railway as to the term and conditions upon which the *road* may be occupied."

Section 3441, Revised Statutes, is thus analogous to Section 3439, requiring property owners' consents.

Section 3443: "Council, or the commissioners, *as the case may be*, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

The result of these statutes as construed by the Ohio courts is to give the Council full power within the municipality, and the County Commissioners full power out-

side of the municipality, that is, territory not incorporated.

There are two further possible cases: one is where a line from a municipality is extended into unincorporated territory; and the other is where a line in unincorporated territory is extended into incorporated territory. In the former case the law requires the street railroad making the extension into unincorporated territory to first obtain special authority from the city in addition to its city grant and the county grant.

In *County Commissioners v. Citizens Electric Railway Company*, 9 Ohio Circuit Court, 183, the court said that:

"Before the company can construct its road, it must *first* obtain authority by ordinance from the municipality; *next*, it must obtain permission from the commissioners, if it passes over a state or county road, and then it must arrange with the property owners by contract or condemnation proceedings to extinguish their rights." (p. 190.)

This opinion was expressly approved in the affirmance of the case by the Supreme Court. *Citizens Electric Railroad Co. v. County Commissioners*, 56 Ohio St., 1, at page 9. The Supreme Court said that Section 3441 (being that relied on by the Traction Companies in the case at bar) must be read with Section 3438, and that action by the *council* under the latter section is necessary to "confer corporate power on street railway companies, and not the right to use and occupy state and county roads in extending tracks over them. *Without such ordinance the company could not extend its road within or without a municipality.*" (p. 8.)

In the other alternative, where a street railroad is extended from unincorporated territory into a city or vil-

lage, there must also be an additional grant by the municipality.

In *C., C. & St. L. Ry. Co. v. Urbana B. & N. Co.*, 5 Ohio Circuit Court (N. S.), 583; affirmed in 73 Ohio St., 364, the court said:

"If the extension were from an original line wholly without the municipality, into or through the municipality, such extension would be, as to such municipality, an original line or new route, and in such case, Section 2502, Revised Statutes, and the other sections would apply." (p. 597.)

The court held:

"... an extension of an interurban electric railway into or through a municipality is an original line, and the notice provided for in Section 2502 and also required by Section 3439 as a condition precedent to the granting of a franchise over the streets of a municipality must be given." (Ex. Syl. 5.)

In *The Cincinnati, Lawrenceburg & Aurora Elec. St. R. R. Co. v. Village of North Bend*, 70 O. S., 46, it was held that North Bend could enjoin the street railroad company "from constructing its road over, along and upon certain streets therein" (page 46) without a franchise from the village. This was held, although the Circuit Court found as a fact, that "the said electric street railroad company does not intend to, nor claims the right to, make such construction without the authority from said county commissioners." (page 48.)

The question was also squarely raised in the case of *Board of County Commissioners of Cuyahoga County v. A. B. & C. Co.*, 21 C. C., 769, where the County Commissioners attempted to grant the right to lay the track

on the *southeasterly* side of the state road under the control of the Commissioners through Newburg and Newburg had granted a franchise over the same road, conditioned that the track should be laid on the *northwesterly* (i. e., the opposite side) thereof. An injunction was asked by the Commissioners against the street railroad building on the northwesterly side of the street and the injunction was refused.

The court held:

"Where the trustees of a hamlet have given a franchise to an interurban street railroad company to lay its tracks on one of the streets of the hamlet which is also a state road, the Commissioners can not maintain an action to enjoin the use of the street by such street railroad company." (Ex. Syl.)

This was a decision by the Cuyahoga County Circuit Court in 1896, Marvin, J., announcing the opinion of the court.

In *re Annexation of Township of Newburgh*, 15 C. C., 78, the court had occasion to again refer to this matter, saying:

"Section 2501 provides that nothing shall be done toward the construction of a street railroad in the streets of a *municipal corporation* until consent of the council of such corporation is obtained. Keeping in mind the fact that the trustees have exclusive jurisdiction of the streets and alleys of the hamlet, it seems clear that they constitute a body which must act for the municipality, under the provisions both of Section 3438 and of Section 2501; and * * * that the construction of such railroad along the streets in the hamlet of Newburgh must be obtained from the Board of Trustees of such hamlet; that board having, as already noted, exclusive control of the streets and alleys." (p. 81.)

In *State, ex rel, v. Cincinnati & Hamilton Electric Street Railway*, 19 Ohio Circuit Court, 79, the company had a grant from the County Commissioners of Butler County to construct and operate its line outside of the city of Hamilton "over a turnpike leading from Hamilton to Cincinnati" (p. 85), and a grant from the city of Hamilton to operate within the city. In order to cross a certain bridge built by the county in the city of Hamilton the Company was by the city granted the right to use the tracks of another company already on the bridge. Fortified by this grant the Cincinnati & Hamilton Electric Street Railway Company started condemnation proceedings against the other company to acquire the right to use its tracks on the bridge. These proceedings were authorized by Section 3440, R. S. It was pointed out that the somewhat conflicting provisions of two acts passed by the Legislature in 1894 as to Interurban Companies did not affect the right to condemn under old Section 3440, R. S. (pp. 90, 91).

Next, in denying the contention that the absence of a county grant to use the bridge was fatal, the court said:

"On the other hand we understand that, by Section 2640, for instance, the municipal authorities 'have the care, supervision and control of all public highways and bridges within the corporation' and this even if the bridge be built by the county." (p. 90.)

The court also said:

"It seems however, to us, that the statute, Sections 3437 and 3438, authorized street railways to be 'constructed or extended within or without, or partly within and partly without, any municipal corporation or unincorporated village.' That is, if a corporation is organized under a charter which gives it a right to

construct its road to a point, say within the city of Hamilton (as we think was the case here), and say, to Cincinnati, that it is authorized to construct its road between these termini if it can obtain a grant *from the city of Hamilton* to construct its tracks *within* that city, and from the County Commissioners or other proper authority *outside* of the city of Hamilton." (p. 89.)

This decision was by the Circuit Court of the First Circuit, which circuit also included Cincinnati.

In *Cincinnati Inclined Plane Railway Company v. Cincinnati*, 7 Ohio Nisi Prius, 541, Ferris, J., later Judge of the Superior Court of Cincinnati, said that:

"The control and regulation of the streets, alleys and highways of the city of Cincinnati were in the municipal board; the revenue derived for the use of the streets was by law the exclusive property of the city, and the right to define and determine the modes of the use of the streets, as well as the conditions under which they should be used, was an exclusive privilege given by the statute to the municipal authorities." (p. 542.)

Section 3438, Revised Statutes, provides that "the right so to construct or extend such railway within or beyond the limits of a municipal corporation can be granted *only* by the council thereof, provided * * * that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of *such city*, except as a new route, and subject to the provisions of sections two thousand five hundred and one and two thousand five hundred and two."

In the omitted portion after the word "provided" there is a reference to "cities" of certain grades, but it is plain that the words "such city" refer to the words "a municipal corporation" in the first part of the section because of the careful use of the singular number. This reference expressly brings in the twenty-five year limitation of Section 2502.

The following language is also applicable. In *Louisville Trust Co. v. Cincinnati*, 76 Fed., 296, Lurton, J., said:

"The legislative history of the state is such, however, as to indicate that the settled public policy of the state is not to confer such easements, but to refer all such companies to the municipality upon whose streets or highways they wish to exercise the franchises conferred by the state for the requisite street easements, upon terms and conditions to be agreed upon between such companies and the local government." (p. 308.)

In *Cincinnati v. Cincinnati Inclined Plane Ry. Co.*, 30 Weekly Law Bulletin, 321, Sup. Ct., General Term, Judge Rufus B. Smith said:

"It should further be borne in mind, that if the construction we have been examining is the true one" (which the court held not to be the true one) "the Legislature has done that which is without precedent in the legislation of Ohio; because such legislation has never undertaken to fix the terms and conditions on which steam railroads or inclined plane railways or *street railways* should occupy the streets of a city, but has always left the fixing of the contract, terms and conditions to be agreed upon by the municipalities and the companies, except in special cases where condemnation proceedings might be resorted to." (p. 325, col. 1.)

This case was affirmed by the Supreme Court expressly on the opinion of the court below, 52 O. S., 609.

In accord are:

Wheeling & Elm Grove R. R. Co. v. Town of Triadelphia, 58 W. Va., 487, Syl. 11.

Mayor of Knoxville v. Africa, 77 Fed., 501; C. C. A., 6th Cir., at page 507.

Underground R. R. v. New York City, 116 Fed., 952; aff'd 193 U. S., 416.

We note that the trial judge nowhere in his opinion (R. 29) expressly said that the County Commissioners had a power larger than the City concedes. In fact he doubtless agreed with the City on this point for he put his decision on two grounds: (1) The Quo Warranto Case; (2) Estoppel. Thus he said:

"The far reaching effect of the doctrine of estoppel as applied to the instant case is manifest. It heals the defect, if any, in every grant here involved." (R. 40.)

As to the part south of Gas Hall he said:

"Whether the question is *res adjudicata* or not, need not now be determined; for, if, as was held by the Circuit and Supreme Courts, the franchise was valid then, it is valid now." (R. 40.)

The rest of this brief will be chiefly devoted to showing that the learned judge misapplied the doctrine of estoppel; and as to prior litigation, (1) that there has occurred an intervening event, to-wit: *the expiration of the franchise*, that renders the prior cases no longer applicable; (2) that these cases do not contain any adjudication against the city.

III.

THE EARLIER LITIGATION DID NOT ENLARGE
THE TRACTION COMPANIES' RIGHT SO
AS TO SUPERCEDE THE TWENTY-
FIVE YEAR LIMIT.

In the bill of complaint below there was set out in paragraph 5 (R. 3) the decree in the case of *State of Ohio, ex rel, v. Millcreek Valley Street Railroad Company*, as adjudicating their right to operate from the Zoo to Gas Hall, and this is the basis of the decree below, that the Traction Companies have a "perpetual right to maintain and operate a street railway over the Carthage Pike" to Gas Hall (R. 45).

At the trial the record in this case was put in evidence by the Traction Companies (omitting the testimony) and also the printed record in an earlier case brought by the Millcreek Valley Street Railroad Company against the Village of Carthage. These were Exhibits 8 and 7, respectively, offered Record pages 50 and 51. There was also a special reference made (R. 51) to the pleadings in the case of the *Louisville Trust Company v. City of Cincinnati*. These three cases were relied on to establish the perpetual right claimed as aforesaid. The Millcreek Valley Street Railroad Company was one of the predecessors in title of the complainants below.

We will take these cases up in detail and show that they establish no such right.

(a)

THE CASE OF THE LOUISVILLE TRUST COM-
PANY AGAINST THE CITY OF CINCIN-
NATI, NO. 4797 IN EQUITY, U. S.
C. CT., S. D. O., W. D.

No grants north of the city limits, that is none of the claims involved in the case at bar were in issue in this case.

To understand Louisville Trust Company case it should be mentioned that theretofore in the case of *Cincinnati v. Cincinnati Inclined Plane Railway*, 30 Weekly Law Bulletin, 321, affirmed by the Supreme Court of Ohio in 52 O. St., 609, it had been held that the Cincinnati Inclined Plane Railroad Company, having been incorporated as a railroad, had no power to hold street railway franchises, and that a certain enabling act referred to did not validate the grants. The case also held that certain grants had expired. Thereafter the Louisville Trust Company sued the city of Cincinnati in the United States court, setting out that they were the holders of an issue of bonds of the Cincinnati Inclined Plane Railroad Company, and that the city was claiming the company had no right to occupy certain streets and was about to grant a franchise to a rival company, and further setting out (R. 237) that the company had the perpetual right to maintain its incline and its street railway lines and asking that the city be enjoined. The bill is set out in full in the Record at page 227, and following. An intervening petition was filed by the trustees of another mortgage (R. 238). The city answered (R. 249) admitting the various grants and referring to the case in the state courts as an adjudication in its favor (R. 255).

In the Court of Appeals, 76 Fed., 296, Judge Lurton handed down a valuable opinion, in which he held that as the trustee was not a party to the case in the state court, the Federal Court was not bound to follow the state court's ruling therein, and also points out that the precise question before the court is "indeed *res integra*" (p. 312). He, thereupon, held that the company had corporate power to accept the grants for street railways, but that certain of the grants had expired; that the fact that the corporation was perpetual did not make the grant of a street railway franchise to it perpetual in contravention of the state law; and further that there was *no estoppel* against the City by having allowed the company to expend large sums of money on its line.

While the City had not obtained by this decision of Judge Lurton as much as had been adjudicated in the state court, still the holding that some of the franchises had expired, destroyed the continuity and, therefore, the usefulness of the line. The City was thus victorious. The Louisville Trust Company ineffectively applied to this court for a writ of certiorari which was denied, 164 U. S., 707. And this court may judicially notice the application in that case, 233 U. S., 24; 64 O. S., 206; 9 Ohio Nisi Prius (N. S.), 561, 562; 76 Fed., 296, 318.

In the said opinion of Judge Lurton, 76 Fed., 296, he concludes that since in the meantime in another case in the same Circuit Court, No. 4859, the Louisville Trust Company had prayed the foreclosure of its mortgage against the Cincinnati Inclined Plane Railway Company, and a receiver had been appointed, the cause should be remanded back to the Circuit Court for further proceedings. Thereafter, in the Circuit Court the two cases were consolidated. See Entry of Consolidation (R. 258). Thereupon the properties of the Railway

Company were sold by judicial decree. Decree for sale (R. 138). Deed of the special master (R. 129).

With these proceedings the City of Cincinnati was not interested. It had won its case. It seems clear, therefore, that the proceedings in the Federal Court in no way operated by way of estoppel, or adjudication, or otherwise to interfere with the claim of the City in the case at bar. The part of the line involved in the case at bar at that time was wholly outside of the city, for it must be remembered that at the time of this litigation the north boundary of Cincinnati was south of the Zoo, the south line of Section 15. This is shown on the plat (Exhibit "A.")

(b)

MILLCREEK VALLEY STREET RAILROAD COMPANY V. THE VILLAGE OF CARTHAGE,
18 OHIO CIR. COURT, 216; AFF'D
62 OHIO ST., 636.

It seems that in 1898 the Village of Carthage attempted to repeal its grants, both the original grant south of Gas Hall of March 19, 1889, and the grant of the extension north of Gas Hall of August 7, 1894 (R. 171). Thereafter the village attempted itself to execute the repeal by tearing up the tracks of the street railway company. An action was brought to enjoin the Village and Judge Hollister, now United States District Judge for the Southern District of Ohio, then sitting as the Common Pleas Court, refused to grant the injunction. Thereafter on appeal to the Circuit Court the injunction was granted on the ground that if there had been any invalidity in the original grant, the Village was estopped by acquiescence to complain and that the attempt to en-

force its change of mind by violence would not be tolerated and would, therefore, be enjoined.

From the foregoing it is obvious that this case was *no adjudication* of a *perpetual* franchise in favor of the street railroad company. This is exceedingly plain since the Carthage franchises had not then expired. Now these Carthage franchises including that south of Gas Hall were relied on by the company in that case. Thus, in the reply of the company to the answer and cross-petition of the Village of Carthage, it refers to the "grant made by the Village Council to said company in March, 1889"; and again, "it further says that the Village of Carthage, by its acquiescence and by divers acts ever since the passage of said *resolution of March, 1889*, is estopped from denying the right of this plaintiff to have and maintain its street railway through the Village of Carthage." (R. 119.)

With these averments before them the Circuit Court said in disposing of the cross-petition of the Village of Carthage:

"It may be stated as a fact, not disputed, that the occupancy of the street and turnpike was not only with the *consent* of the village, *but through its council* the road was located, extended and double tracked *at its special instance and request*; or, in other words, briefly stated, we have a case where a municipal corporation, through its council, *invites* a company or corporation to come into its corporate limits and to occupy its streets with railroad tracks for the purpose of operating a street railway," and thereupon the company constructed such line. (18 C. C., 216, 229, 230.)

The court proceeds:

"The village of Carthage *did more than to stand by and silently see the corporation, the*

predecessor of the plaintiff in the chain of title, construct a street railroad in and upon its streets. It, by resolution and by solemn acts of its council, urged and encouraged it to do so. How can that same village be heard to say that the action of its council was wrong, unauthorized, *and that it had no power to give the privileges or to make the grants it attempted to do?* We think this is a question the village is not in a position to raise in a court of equity." (p. 230.)

Thus it is plain that the court in the Millcreek Valley case did not have before it and did not attempt to adjudicate the rights of the parties *after the expiration* of the franchises of the Village of Carthage, a case not then before them.

(c)

STATE, EX REL, V. THE MILLCREEK VALLEY
STREET RAILROAD CO., NO. 3415 HAMIL-
TON CIRCUIT COURT (R. 179).

It is plain, we believe, that the first two cases above referred to, that is, the Louisville Trust Company case and the Village of Carthage case, did not in any wise adjudicate the questions in the case at bar. However, considerable stress is laid upon the *quo warranto* case last above cited. This proceeding was brought *before* the expiration of the Carthage franchises, like the other cases, on the relation of the prosecuting attorney of Hamilton County. The pleadings are found in the Record at page 179 and following.

We recall that on February 11, 1889, the Inclined Plane Railway Company wrote to the Village of Carthage the following letter, found in the record at page 218:

"OFFICE OF THE CINCINNATI INCLINED PLANE
RAILWAY COMPANY.

"CINCINNATI, February 11, 1889.

"TO THE HONORABLE COUNCIL OF CARTHAGE.

"*Gentlemen:* Our application to the County Commissioners for permission to extend our road from its present terminus at the Zoological Garden to the Village of Carthage is opposed by an application from the Cincinnati Suburban Railroad Company, represented by Mr. McCrear. The Commissioners can by simple resolution, give us the right to go ahead, *as it will be an extension of an existing road*, but in the case of our opponents the route must be established, bids advertised for and acted upon, all making a loss of much time, and probably ending in injunction and litigation, preventing for a long time to come the construction of any road."

"THE CINCINNATI INCLINED PLANE
RAILWAY COMPANY,

"J. M. DOHERTY, Sec'y."

The allusion to the fact that the proposed line is an *extension* is important, for the Ohio Statutes allowed extensions without competitive bidding. (Sec. 2505, Revised Statutes.) It was, however, provided in this same Section 2505 that "when any such extension is made, the *charge* for carrying passengers on any street railroad so extended, and its connections made with another road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation." And this was so held in *Cleveland v. Cleveland City Ry. Co.*, 194 U. S., 517, 533.

The theory then of this *quo warranta* proceeding was that since the company had admitted the line north of the Zoo was an extension of the line south of the Zoo, and since it was a fact that for a short time a five-cent

fare had been charged to the Zoo by the old Cincinnati Inclined Plane Railway Company, that, therefore, there should be only a five-cent fare charged to Carthage. Amendments were made to the petition alleging the absence of grants over certain portions of the line. *But at that time the twenty-five year period had not expired.* (See Petition, R. 181.)

Without any opinion being announced in either the Circuit Court or in the Supreme Court, 74 Ohio State, 453, the petition was dismissed. The case in Ohio is of course no authority as a precedent, as that is the rule laid down by the Supreme Court of Ohio in regard to its unreported cases.

Railway Co. v. Greenville, 69 O. St., 487, at 499.

See also:

Wyman v. Robbins, 51 O. St., 98, at 105.

NEITHER HAS THE QUO WARRANTO CASE ANY EFFECT IN THE CASE AT BAR AS AN ADJUDICATION.

Because of the above mentioned contention that the road was an extension only, the decree naturally specified that the grant from the County Commissioners was a distinct and independent grant upon the terms therein set forth. But to say that this adjudication established a *perpetual* right in favor of the Traction Companies within the Village of Carthage south of Gas Hall seems remarkable for the following reasons:

1. The company in the *quo warranto* case expressly relied on this grant of the Village of Carthage of March 19, 1889. It was referred to in the petition therein found in the Record at page 181. And in the amendment to the answer of the Millcreek Valley Street Railroad Com-

pany, the franchise is expressly pleaded in the following language:

"This defendant further files herewith and makes a part hereof a true copy of the resolution passed by the incorporated Village of Carthage, on the 19th day of March, 1889, which is hereto attached, and marked Exhibit No. 9." (R. 195.)

In view of the fact that the company, when called upon to show by what warrant it was operating its lines, set out as its warrant both its grant from the County Commissioners and also the then unexpired grant in the Village of Carthage, how can it be said that an adjudication dismissing the petition establishes a *perpetual* right in the company? It seems hard to be patient with such an argument.

2. The reference in the decree (R. 3) to the County Commissioners' grant says nothing about its duration, nor does it even attempt to state that the County Commissioners' grant is good in the Village of Carthage to the exclusion of the village grant. What it says is that the County grant "was not a grant of an extension to the line then and theretofore operated by the Cincinnati Inclined Plane Railway Company on Vine Street in the City of Cincinnati, but that the same was a distinct and independent grant, *upon the terms therein set forth*, to the Cincinnati Inclined Plane Railway Company of the right to construct, maintain and operate a street railroad in the Carthage Turnpike."

This is not an adjudication of a perpetual grant which the Village of Carthage is powerless to prevent.

Further, we notice the statement that the County Commissioners' grant "was a distinct and independent grant, *upon the terms therein set forth*." What are these terms?

The County grant is found in the Record on page 14 and is

“To enable the said company to furnish continuous rapid and safe transportation between Fountain Square, in Cincinnati and the Village of Carthage.”

The fourth condition is—

“That the tracks be laid on each side of said turnpike * * * or as may be otherwise ordered by the Council in the Villages through which said road is located * * *.”

Also 5th—

“The electric road” shall be “put in operation within twelve months from the time said company *shall have acquired the legal right to so construct* * * *.”

These then are the terms adjudged by the court, and these terms clearly bring in or concede the grants of the Village of Carthage. And the “legal right” “acquired” from the Village of Carthage expired March 19, 1914.

Even a literal construction of the decree in the *quo warranto* case does not aid the Traction Companies. Compare: Tayler, Judge, in *Cleveland Electric Ry. Co. v. Cleveland*, 137 Fed., 111, 118.

3. The *quo warranto* proceeding is merely an adjudication of a *present right*. This right may end tomorrow, but if the right exists today, the proceeding in *quo warranto* must be dismissed. This is shown further by the prayer of the petition in the *quo warranto* case:

“Wherefore, plaintiff prays that the said defendants may be required to avow by what warrant they claim to hold and exercise all and singular the franchises aforesaid, and upon final

hearing of this cause that they be ousted and altogether excluded therefrom, and that relator recover his costs." (R. 182.)

4. Further, it is the law of Ohio that one *quo warranto* proceeding is no bar to a second *quo warranto* proceeding. This naturally follows from the principles set out in the last mentioned paragraph.

Section 6761 of the Revised Statutes of Ohio provides for a proceeding in *quo warranto* against the corporation,

"4. When it has * * * exercised a franchise * * * in contravention of law."

Section 6774 provides that—

"When a defendant is found guilty of * * * unlawfully holding or exercising an office, franchise or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom."

Section 6780 provides in part that:

"When it is found and adjudged that a corporation is * * * exercising a power not conferred by law, judgment shall be entered that it be ousted from the * * * exercise of such power."

That the *quo warranto* case is no adjudication as against the City, see *Ohio, ex rel, v. The Cincinnati Gas Light & Coke Co.*, 18 Ohio St., 262, where the court held:

"A judgment in favor of the defendant heretofore rendered by the District Court of Hamilton County, upon an information in the nature of a *quo warranto*, filed by the prosecuting attorney of that county, upon an individual relation, is not a bar to a subsequent information

of a similar character, filed by the attorney general, in the exercise of the discretion given him by statute." (Syl. 4.) See also page 303.

In this case the first proceeding in *quo warranto* was promoted by the officers of the City of Cincinnati who were also the ones most interested in the second case.

In *State, ex rel. v. Railroad Co.*, 50 Ohio St., 239, the court said:

"To sum up, the object of a proceeding in *quo warranto* against a corporation, is to determine by what right it exercises a certain franchise . . . franchise as here understood, being, as defined by Kent, a particular privilege conferred by the grant of the government and vested in individuals; or, as defined by Blackstone, a branch of the King's prerogative subsisting in the hands of a subject. 3 Kent, 458; 2 Bla. Com., 37. Or it may be to oust it from the right to be a corporation for an abuse or non-user of a franchise granted. Hence it is, that the state must always be the plaintiff, as it alone can complain of such usurpation of its authority, or abuse of privileges granted. *It is not then a suit for the vindication of the proprietary rights of the individual as against the claims of a corporation; the remedies of the individual against a corporation for the recovery of property being the same as against a natural person.*" (p. 251.)

In *State, ex rel. v. Cincinnati & Hamilton Electric Street Railway Company*, 19 C. C., 79, the court said:

"But if this be not so the county is not a party to this condemnation proceeding, and it is difficult to see why the state should intervene in this way to protect its rights, which it would

seem could not be affected by the proceeding to which it is not a party." (p. 90.)

See also

State v. Tin & Japan Co., 66 O. St., 182.

Lutterby v. Herancourt Brewing Co., 12 Ohio Dec., 67, 68.

Society Perun v. Cleveland, 43 O. St., 481.

The decree of a court can not be broader than the issues made therein. *East Tennessee Telephone Co. v. Frankfort*, 190 Fed., 346, 350, 351.

And in addition to the foregoing the city is in no wise bound by the *quo warranto* case, because it is apparent from the record that the *city was not a party* thereto, did not have its day in court and was not complaining.

In view of the foregoing propositions it is respectfully submitted that the alleged adjudications in no way touch upon the situation since *now* the twenty-five years *have expired*.

We have, therefore, established the fact that there is no franchise under which the Traction Companies can operate over the 4350 feet between the south line of the former Village of Carthage and Gas Hall, excepting the franchise granted by the Cincinnati ordinance of April 21, 1914, the one attacked at bar. This is alone sufficient to justify a reversal.

However, the principles set out above, if applied to the other grants of the city, have a far reaching effect.

The grants on Carthage Pike, south of St. Bernard on the west side and south of the north line of Section 15 on the east side, being within the then corporate limits of the towns of Clifton and Avondale, expired twenty-five years after the date of the grant, even if the grant of the

County Commissioners be considered. The franchise as to these portions, therefore, expired on the 23rd day of February, 1914, whether it is based on the County grant, or on the doctrine of estoppel, of which see more below.

IVa.

THERE IS NO FRANCHISE TO OPERATE OVER ERKENBRECHER AVENUE.

There is no pretense that any *franchise* has ever been granted by any one to operate a street railroad on Erkenbrecher Avenue. The consent of the Trustees of the Zoological Land Syndicate, April 6, 1889, was never recorded (R. 52), and the dedication of Erkenbrecher Avenue to the city of Cincinnati, Exhibit "I" was February 21, 1890 (see date on Plat Exhibit "I," opposite (R. 278). This dedication was not made subject to any right of any street railroad company in Erkenbrecher Avenue and no attempt was made to show any notice, actual or constructive, to the city of any rights in Erkenbrecher Avenue. It was for this reason objection was made especially to the offering of the consent (R. 51, 52).

Over and above this there is a section of about 241 feet at the entrance of the Zoo where the Trustees of the Zoological Land Syndicate *never had any title*, and therefore could grant no easement to the street railroad company. We do not believe that appellees question this fact (shown by the plats, Exhibits "I," "J," and "K," Record 279, 280, 281, and by the deeds Exhibits "L," "M," "N," and "O," Record 281 to 294, and by the suit, Exhibit "P," Record 295 to 312), or the further fact that the title to the 240 feet in question was at that time in the Zoological Society of Cincinnati. These facts also

appear from the plat, Exhibit "1," opposite page 278. This plat contains on its face (1) the dedication of Erkenbrecher Avenue by the Trustees of the Zoological Land Syndicate, (2) the dedication by the Zoological Society, and (3) the ordinance of acceptance by the city of Cincinnati. There is no street railway franchise to be found on this plat.

In Ohio instruments conveying an interest in land must be recorded; Rev. Stat. Ohio, Section 4134, now General Code of Ohio, Section 8543.

Hence the dedication by the Trustees was *not* subject to their consent to the Traction Company, and the Zoological Society or the city never consented to the laying of the track on the 241 feet.

NO RIGHT TO OPERATE OVER ANY PART OF ERKENBRECHER AVENUE HAS BEEN ADJUDICATED AS AGAINST THE CITY.

NO ESTOPPEL.

At the time of the Louisville Trust Company case, Erkenbrecher Avenue was outside of the city limits and, therefore, the city was not interested. At the time of the Carthage injunction case this avenue was not in the village of Carthage and, therefore, the village of Carthage was not interested. Neither is there any adjudication of right in the *quo warranto* case for the reasons mentioned above.

Either the tracks in Erkenbrecher Avenue were laid before, or they were laid later than, the dedication of the track to the city. The date of this dedication was May 2, 1890, and is shown by the ordinance copied on the plat, Exhibit "1," opposite page 278 of the Record. If the tracks were not laid until after the dedication, it is plain that the city would not be bound on any principle of a prior grant to the Traction Companies. If, however, the tracks were laid before the dedication, then a franchise

by estoppel has expired, because of the twenty-five year limit. THERE CAN BE NO FRANCHISE BY ESTOPPEL FOR A LONGER PERIOD THAN ALLOWED BY LAW FOR A FRANCHISE BY EXPRESS GRANT. We contend that there is no franchise by estoppel in Ohio, but even assuming that there may be, as intimated by the court below, twenty-five years have expired. Apparently the trial judge had some doubt on this question, for he finds in his judgment as to the 241 feet of Erkenbrecher Avenue (the portion within the red lines on the inset map on Exhibit "A"), that the companies have "the present right to maintain and operate a street railway" (R. 45). Nothing is here said as to the length of this right, while as to the other sections the term is mentioned expressly.

It would seem elemental, even though there had been a prior grant to a street railway in a private way which afterwards became a city street, that the right of the street railway could rise no higher than an easement in the street for its rails or the like, and could not operate to exempt the street railway from municipal regulation or relieve it from franchise obligations. If authority for such a proposition be needed, we call attention to the following case:

Mayor of Baltimore v. United Railways & Elec. Co., 107 Md., 250; 14 L. R. A. (N. S.), 805:

"A percentage tax upon the gross receipts of a street railway company within the limits of a city, imposed in consideration of the grant of a franchise to use the streets, does not apply to the company's private rights of way in territory afterward annexed to the city, but does apply to private grants of rights of way in what afterwards become streets of the city, and to

legislative grants of rights of way in highways that become streets of the city by annexation." (Syl. L. R. A.)

NO ESTOPPEL CAN CONFER AN UNKNOWN POWER ON A MUNICIPALITY.

In *L. & N. R. Co. v. Cincinnati*, 76 O. St., 481, in holding that even by ordinance the city could not grant the right to cross with an elevated structure the public landing, the court said:

"There being an entire absence of power to make the grant, there is no room for an estoppel." (p. 507.)

See in accord:

Burke v. Southern Pacific Co., 234 U. S., 669,
Syl. 10.

Beach v. United States, 226 U. S., 243, 260.

In addition are the cases following:

THERE CAN BE NO FRANCHISE BY ESTOPPEL AS AGAINST THE CITY OR VILLAGE TO OPERATE A STREET RAILWAY IN A PUBLIC HIGHWAY.

Louisville Trust Co. v. City of Cincinnati, 76 Fed., 296;
C. C. A., Sixth Circuit:

"The act of Ohio, March 30, 1877, provided that no motive power other than animal should be used upon any street railroad held or acquired thereafter by an inclined plane railway without the consent of the board of public works in any city having such a board. *Held*, that the fact that a company, acting under resolutions of the board of public works giving its

consent thereto, expended large sums in changing the motive power from horse to electricity, *did not estop* the city from denying the company's right to occupy the streets, nor operate as an extension of expired grants of franchises; the law at the time requiring grants of street franchises to be made by city ordinance." (Syl. 9.)

In this case Judge Larton said:

"It is not, therefore, competent for the board of public affairs to extend such an easement without the concurrent action of the legislative branch of the government, *and the mere non-action* of the municipal government *after the expiration* of a part of the street grants under which the company was occupying the streets *neither creates an estoppel* nor operates as an extension of grants which could only be extended by ordinance duly enacted." (p. 316.)

In *Cincinnati v. Cincinnati Inclined Plane Ry. Co.*, 30 Weekly Law Bull., 321, affirmed on the opinion of the Superior Court, 52 O. St., 609, the court said:

"But it may be said that the expenditures which the defendant incurred in substituting electricity as a motive power estops the city from claiming there was not a renewal, and therefore there is a renewal by estoppel.

"It is sufficient answer to this claim to say that these expenditures were not authorized by both boards in whom was vested jurisdiction to make renewals." (p. 327, col. 1.)

In *Cleveland Elec. Ry. Co. v. City of Cleveland*, 137 Fed., 111, the court said:

"The rule that obligations arise or rights are granted by mere implication depends upon the

nature of the parties, and the character of the obligations and rights. It is a very easy thing for a man competent to contract to have his rights determined by the just implications from his acts. He may find himself parting possession with his property even when he did not intend to do so. *But this is all but impossible with a municipal corporation.* Indeed, a municipal corporation, through its council or officers, may sometimes make strenuous effort to part with its property or with public rights and fail in the effort. Instances of this kind could be indefinitely multiplied. But to say that a municipal corporation, the delegate of sovereignty, has parted with one of the powers of sovereignty, by implication, is to assume that which, while not impossible, can only be supported by the strongest proof, and by an implication so cogent as to be quite as impressive and conclusive as if the grant had been made in express terms." (pp. 122-123.)

One forcible and just reason for denying franchises by estoppel is that the claimant has an equal opportunity for knowledge with the municipality of its want of power and the claimant can not be said to have been at all misled.

As long ago well said by the Supreme Court of Ohio in *Cincinnati Gas Light & Coke Co. v. Arondale*, 43 O. S., 257:

"The company was bound to know the law and the powers of the council, and there is shown no principle or act of estoppel that prevents the village from now setting up such want of power in that former council, or that estopped the village from disregarding, in future, and after due notice, any part or all of that contract." (p. 269.)

This case was approved in *City of Wellston v. Morgan*, 59 O. S., 147, at 157.

City of Detroit v. Detroit United Ry., 172 Mich., 136:

“Against a municipality no estoppel arises because of inaction on the part of its officials.” (Syl. 9.)

This case was affirmed by the Supreme Court of the United States, 229 U. S., 39. This court said:

“The railway took the several grants with knowledge of their duration.” (p. 45.)

(Note that the reference to the affirmance following the syllabus in the Supreme Court report is erroneous, but the identity of the case is established by the dates and by the franchises referred to.)

Township of Bangor v. Bay City Traction & Elec. Co., 147 Mich., 165:

“The failure of the officers of a township to take steps to prevent the unauthorized building of a street railway in its highway, or acquiesce therein does not estop the township from maintaining a bill in chancery to compel removal of the tracks.” (Syl. 2.)

A street railroad in a public street without a city franchise is a trespasser—

Stewart v. Village of Ashtabula, 36 Weekly Law Bulletin, 46; Supreme Court of Ohio.

Cincinnati v. Cincinnati Inclined Plane Ry. Co., 30 Weekly Law Bulletin, 321, 327, col. 2, aff'd on opinion of Superior Court, 52 O. St., 609.

Rogers v. Cincinnati N. W. Ry. Co., 12 Ohio Decisions, 136.

Detroit v. Detroit United Railways, 172 Mich., 136; Syl. 2; aff'd 229 U. S., 39.

Canal & C. St. R. R. Co. v. New Orleans, 39 La. Ann., 709.

E. Tenn. Telephone Co. v. Russellville, 106 Ky., 667.

IN OHIO EVEN AS BETWEEN PRIVATE PARTIES A PERMIT TO LAY TRACKS IS A MERE LICENSE, NO TERM BEING NAMED.

Rodefer v. Railroad Co., 72 O. St., 272:

"A siding or switch constructed by a railroad company from its road to a manufactory at the expense and over the land of the latter, solely for its benefit and for the sole purpose of affording it facilities for receiving and shipping freight, and under a written agreement silent as to the length of time it is to remain, may not be maintained by the railroad company against the objection of the owner of the manufactory; the agreement, so far as the right of the railroad company is concerned, being merely a license revocable at the option of the licensor of his grantee." (Syl.)

This case contains a valuable review of the authorities.

The *Rodefer* case (72 O. St., 272) was followed in *Mueller v. Cincinnati Traction Co.*, 6 Ohio Law Reporter, 596, where a written permit had been given to the Traction Company to construct a loop in front of "Mueller's Garden," and the loop had been in fact constructed. The license was held terminable at the will of the licensor.

In accord are:

Yeager v. Tuning, 79 O. St., 121.

Fowler v. Delaplain 79 O. S., 279 (Syl. 2 and 3).

It is also the law of Ohio that a railroad can not by prescription acquire the right to maintain bridge abutments within the limits of a public street:

L. S. & M. S. Ry. v. Elyria, 69 O. S., 414, was followed in:

C. H. & D. Ry. v. City of Sidney, 12 Ohio Law Rep., 575, to appear in 91 Ohio State.

IVb.

NO FRANCHISE FOR TRACK ON THE EAST
HALF OF SPRINGFIELD PIKE IN THE
FORMER VILLAGE OF
HARTWELL.

There is no dispute in the testimony, but that the west corporation line of Hartwell, and now of Cincinnati, is the section line which lies approximately in the center of Springfield Pike. Coates, the surveyor, testified that he had correctly located the line as the red line on the plat, Exhibit "B," opposite page 270 in the Record. (See testimony of Coates, pages 60 and 62.)

Mr. Punshon, a civil engineer and surveyor, in describing what portions of the line were outside of the incorporated territory said:

"* * * the next portion of the pike is *the western half* of the Springfield Pike extending from Decamp Avenue to the northern boundary line of Hartwell * * *."

"Q. Now what is the situation today—so that the court may understand it?

"The Court: You mean as to what is outside of the corporate limits?

"Q. Yes?

"A. The only portion outside of the corporate limits today is the west half of the Spring-

field Pike from Decamp Avenue to the north boundary of Hartwell.

“Cross-examination waived.” (R. 60.)

The consent of the former owners of Springfield Pike is no more than a consent under Sections 3441 and 3443, Revised Statutes, as explained above (p. 16 hereof). The consent of the Turnpike Company does not suffice without a franchise from the County in unincorporated territory, or from the municipality in incorporated territory. Further, the consent of the company can not survive its existence as a toll road. The surrender of the road to the County in evidence as Exhibit C-1 (R. 272), is without the reservation of any grant to any company. Neither were tracks laid in the Pike until after the date of this surrender. The surrender was in 1897. The tracks were not laid until after 1900 (Sawyer, R. 63).

Inasmuch as there can be no estoppel against the City or its predecessor the village, as shown by the foregoing decisions, it is plain that the Traction Companies had no right to operate over the east half of the Springfield Pike. And as shown above (page 14), the county grant could not take the place of the village or city grant.

V.

THE CARTHAGE GRANT NORTH FROM GAS HALL HAS EXPIRED.

This grant was made August 7, 1894 (pp. 17 and 19). This ordinance is without limitation as to time. It is in terms an extension. It, therefore, expired with the term of the grant to which it was an extension, to-wit: the only other Carthage grant, namely that of March 19,

1889. On this point in *Cleveland Elec. Ry. Co. v. Cleveland*, 137 Fed., 11, Judge Taylor said:

"I have reached the conviction that it is beyond the power of council to endow an 'extension' with a duration of life extending beyond the life of the line which is extended." (p. 127)

"The life of the right to operate it must, in the very nature of things, terminate with the life of the main body of which it is a part. The effort of the council to give it life beyond the life of the main stem is not effective, either to give the right to operate the additional track beyond the period fixed by the ordinance for the main stem franchises, or, by reason of the grant of the additional track, to extend the life of the line of which it forms a part * * *. One might as well say that the human foot could survive after the vital organs had ceased to exist; that, where there is one life giving center, the things which grow out of it and are subsidiary to it may live after the life giving center has ceased to have life; that the tree, having sent forth a branch, might die, but leave the life of the branch unaffected. The whole theory of the claim that an extension can live longer than the thing extended is at war with reason and with the nature of things." (p. 131.)

In *Blair v. Chicago*, 201 U. S., 400, this court said:

"The extension into Lake View was part of the North Side Railway system, which by the terms of the grants from the city were limited to twenty-five years, and no longer * * *. A fair inference would be that, in extending this part of the system so as to make a portion of that already granted, such grants were to be made for the same term as those already made." (pp. 485, 486.)

THE HARTWELL GRANTS.

The Hartwell grants are extensions of the line in Carthage, and for the reasons given under the last subdivision expired with the Carthage grant of March 19, 1889.

VI.

COUNTY COMMISSIONERS' GRANTS ARE LIMITED TO TWENTY-FIVE YEARS.

In the Revised Statutes of 1880, Section 3439, is made to refer to Section 2502 in terms. April 18, 1883, Sections 3838 and 3839 were amended (80 Ohio Laws, p. 173). This amendment as to Section 3439 was unconstitutional because it excepted a county.

Ry. Co. v. Ry. Co., 5 Ohio Circuit Court (N. S.), 583, affirmed 73 O. S., 364.

The rule is well expressed in *State v. Buckley*, 60 O. S., 273:

"Such an exception can not be held invalid and thereby extend the act over the excepted territory, because in such a case the General Assembly never enacted the statute in such territory, and the court has no power to enact it therein." (Syl. 2.)

This has long been the law of the state:

Kelly v. State, 6 O. S., 269, pp. 269, 270.

State v. Lewis, 74 O. S., 403, Syl. 1.

State v. Bargas, 53 O. S., 94.

Silberman v. Hay, 59 O. S., 582.

Wallace v. Liler, 76 O. S., 185.

Noble v. Clark, 15 C.C.(N.S.), 145.

Security Ins. Co., v. Michael, 14 C.C.(N.S.), 95.

The amendment being unconstitutional, the repealing clause falls with it:

Re Bachtel, 11 C. C. (N. S.), 537, Syl. 3, p. 544.
State v. Buckley, 60 O. S., 273, Syl. 4, pp. 276,
 277.

Counsel for the appellees correctly admitted below that the Supreme Court of Ohio has never held a county franchise perpetual, neither has there been any case in Ohio holding that a county franchise can be good in a municipality for any term whatsoever. The latest expression of the Supreme Court of Ohio is found in *East Ohio Gas Co. v. City of Akron*, 81 O. St., 33. The court said:

"It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the Gas Company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant in error, on more mature reflection, would not insist upon such a conclusion." (p. 527.)

In *Ampt v. Cincinnati*, 6 Nisi Prius, 401, affirmed 21 C. C., 300, the court held void a grant without limitation in time.

See Also:

Constitution of Ohio, Art. I, Sec. 2.

Calder v. Mich., 218 U. S., 591.

Wabash R. R. Co. v. Defiance, 167 U. S., 88.

VII.

FRANCHISE GRANTS ARE TO BE CONSTRUED
AGAINST THE GRANTEE IN FAVOR
OF THE PUBLIC.

In *Detroit United Railways Co. v. Detroit*, 229 U. S., 39, Mr. Justice Day said:

“The principles upon which grants of this character are to be construed have been frequently declared in this court. They were stated by the late Mr. Justice Peckham, speaking for the court, in *Cleveland Elec. Co. v. Cleveland*, 214 U. S., 116, 129.

“The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislatures with a view of obtaining from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. *Blair v. Chicago*, 201 U. S., 400, 471.’ ” (p. 44.)

In *Central Transportation Co. v. Pullman Car Co.*, 139 U. S., 24, the court said:

"By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public * * *." (p. 49.)

In *East Ohio Gas Co. v. Akron*, 81 O. St., 33, the court said:

"This court laid it down as the law, in *Railroad Co. v. Defiance*, 52 O. S., 262, 307, that:

" 'Every grant in derogation of the right of the public in the free and unobstructed use of the streets or restriction of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant.'

"The doctrine, as well as the judgment, in this case was affirmed in *Wabash Railroad Co. v. Defiance*, 167 U. S., 88." (pp. 52, 53, the court citing other authorities.)

Black v. Del. Canal Co., 24 N. J., Eq., 455:

"The rule of construction is settled, that what is not clearly granted is withheld. Any ambiguity in the terms of a grant must operate against the corporation, and in favor of the public. To be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation." (Syl. 7.)

In *Cincinnati v. The Cincinnati St. Ry. Co.*, 12 Ohio N.P.(N.S.), 305, aff'd by Supreme Court in 13 Ohio Law Reporter, 83, the court said:

"And even were the mind to rest in doubt about it, as against the beneficiary of franchises

of this character, such doubt must be resolved in favor of the city." (p. 308.)

In *Central Trust Co. v. Municipal Traction Co.*, 169 Fed., 308, Circuit Judge Knappen, then District Judge, said:

"The rule applicable to the ascertainment of that intention is that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public. Whatever is not unequivocally granted is withheld, and nothing passes by implication." (p. 312.)

The court said this of a Cleveland ordinance citing many authorities.

In accord are:

Fertilizing Co. v. Hyde Park, 97 U. S., 659, 666.
State, ex rel, v. Hudson River Trac. Co., 73 N.
 J. Law, 227.

Belt Line Ry. v. City of Montgomery, 201 Fed., 411, Syl. 1.

CONCLUSION.

We have shown the following links in the plaintiff's line to be defective. Commencing at the south of Plat "A," we have shown that there is no grant of any sort over the portion within the red lines on the inset map, and that over this portion and over Erkenbrecher Avenue to Carthage Pike, if there was any franchise by estoppel, it has expired. We have also shown that in the former village of Carthage from the Gas Hall south, the franchise expired March 19, 1914. This franchise having expired, the extensions thereof from Gas Hall to the

south line of the former village of Hartwell and the extensions in Hartwell end with the grant of the parent line.

Inasmuch as the County Commissioners can give no valid grant in incorporated territory, the portions of the line east of the center line of Springfield Pike on the west side of Hartwell are maintained without warrant of law. But even if we should concede that County Commissioners can give a valid grant within a municipality, still within such municipalities their power is clearly limited to twenty-five years, because of the express provisions of Section 2502. This being the case, the grants on Carthage Pike north of the intersection with Erkenbrecher Avenue, within those parts which were formerly the village of Avondale and the town of Clifton, expired March 23, 1914.

Inasmuch as the ordinance attacked in the case at bar, is valid if over any part of the line of the complainants below they have no franchise, or having had one it has expired, and as such want of franchise in fact exists, the decree of the trial court should be reversed.

Respectfully submitted,

WALTER M. SCHOENLE,

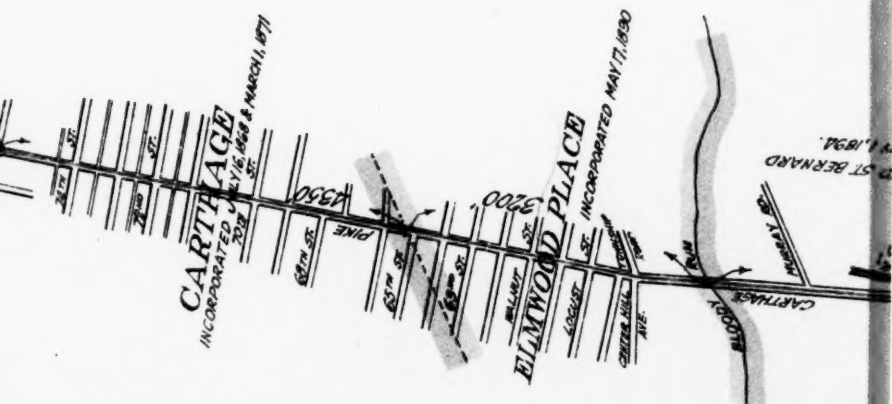
Solicitor of Cincinnati,

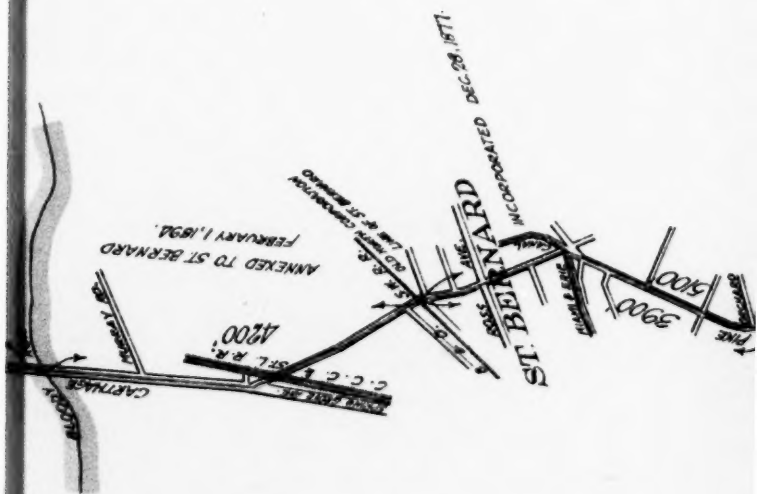
CONSTANT SOUTHWORTH,

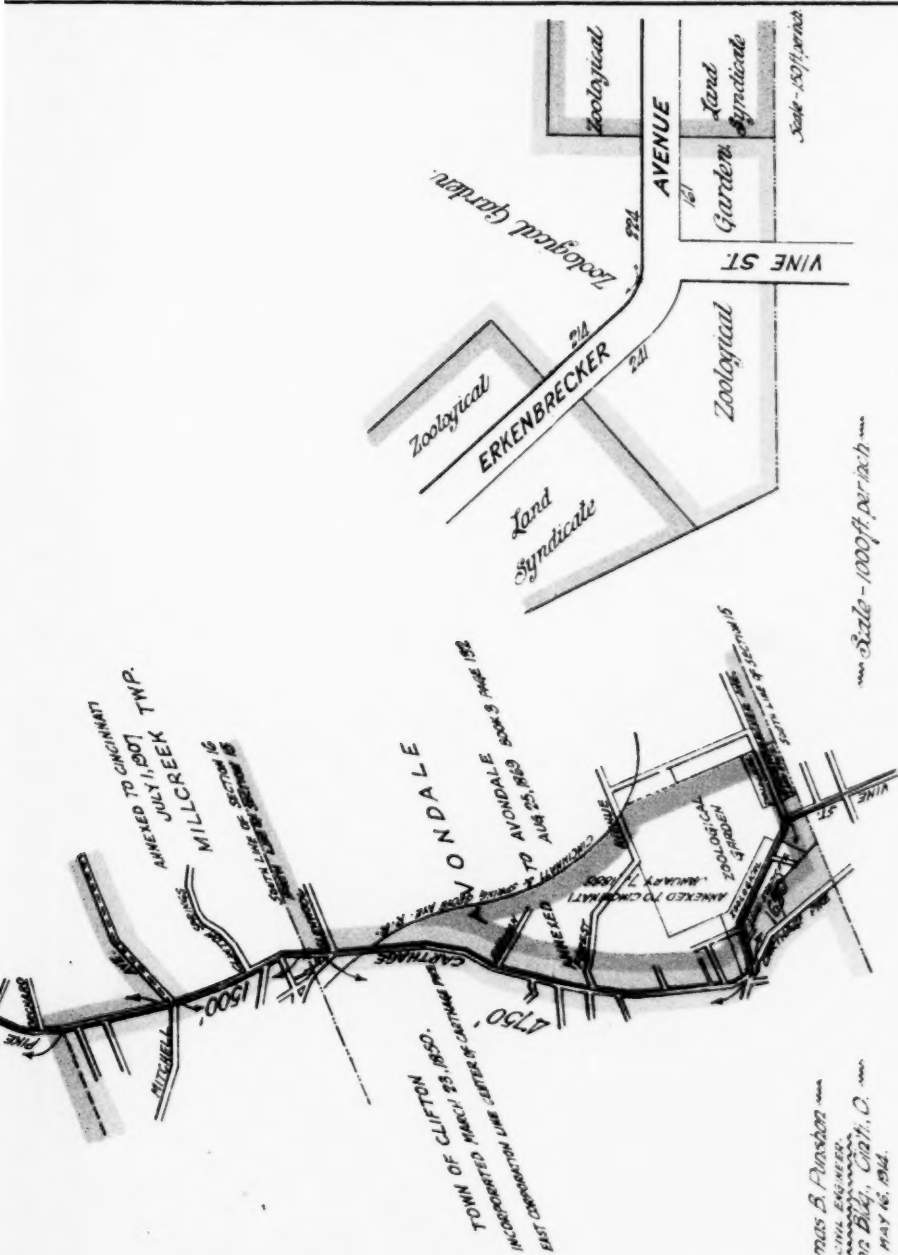
Assistant City Solicitor.

August 21, 1915.

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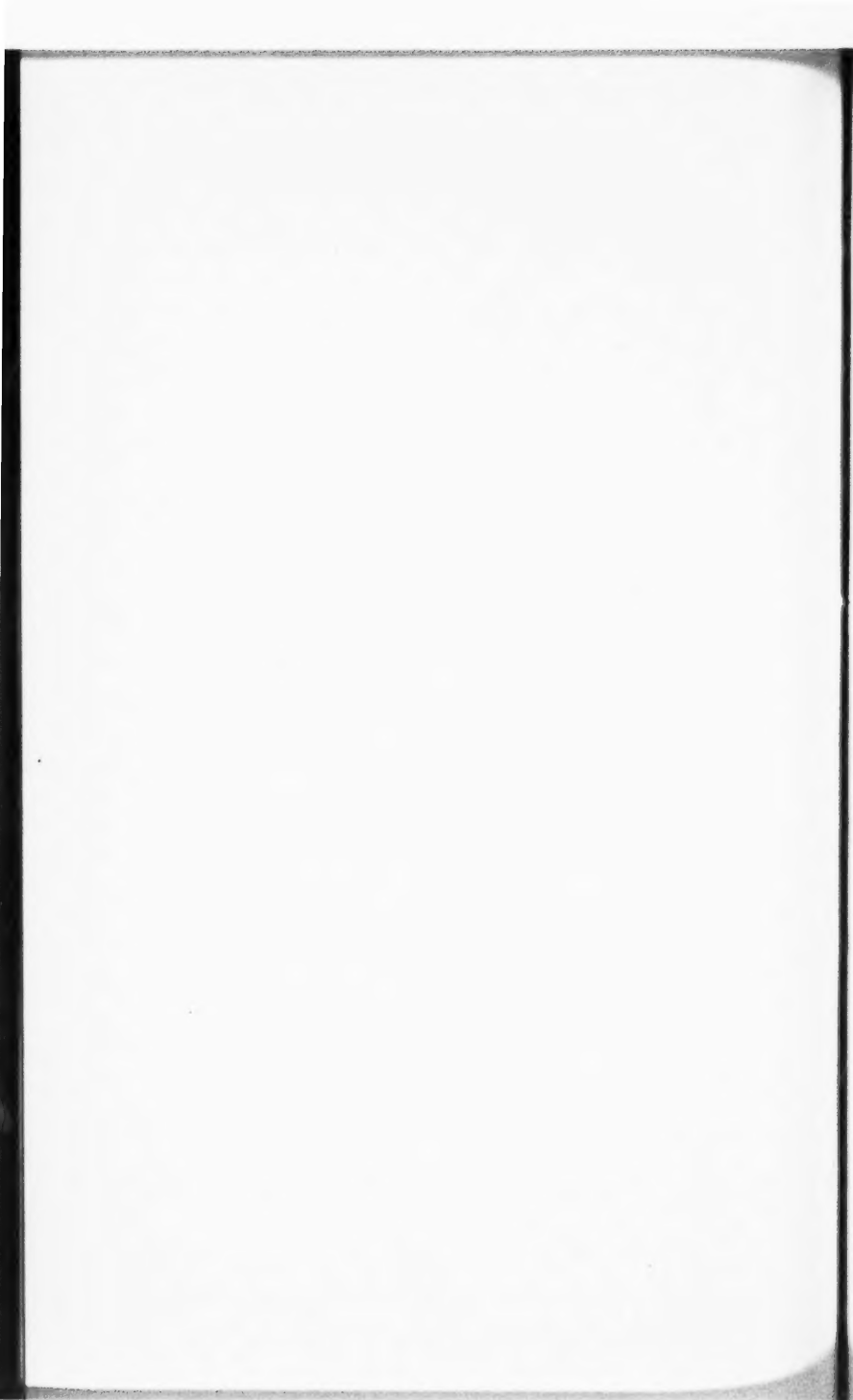






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APPENDIX.

REVISED STATUTES OF OHIO OF 1880.

(Enacted June 20, 1879.)

Section 2501. "No corporation, individual, or individuals shall perform any work in the construction of a street railroad until application for leave is made to the council, in writing, and council, by ordinance, shall have granted permission, and prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor; and cities of the first and second grades of the first class may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interests." (66 v. 217, Section 411; 76 v. 156, Section 4.)

Section 2502. "No ordinance for such purpose shall be passed until public notice of the application therefor has been given by the clerk of the corporation, in one or more of the daily papers, if there be such, and if not, then in one or more of the weekly papers published in the corporation, for the period of at least three consecutive weeks; and no such grant shall be made except to the corporation, individual or individuals that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders on the line of the proposed street railroad, represented by the feet front of lots abutting on the street along which such road is proposed to be constructed; provided that no grant, nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordi-

nance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant." (67 v. 77, Section 412; 76 v. 156, Section 5.)

Section 2503. "Before any street railroad shall be constructed on any street of less width than sixty-seven feet, with a roadway of forty feet or under, the council shall provide that the crown of the street shall be made a nearly flat uniform curve, from curb to curb, without ditch-gutters and in such manner as to give all wheeled vehicles the full use of the roadway up to the face of the curb, after the plan of the streets in the cities of Philadelphia and New York. And on any street, whenever the tracks of the two street railroads, or of a street railroad and a steam railroad, cross each other at a convenient grade, the crossings shall be made with crossing-frogs of the most approved pattern and materials, and kept up and in repair at the joint expense of the companies owning said tracks." (66 v. 217, Section 413.)

Section 2504. "The council may require any part or all of the track between the rails of any street railroad, constructed within the corporate limits, to be paved with gravel, boulders, or the Nicholson, or other wooden pavement, as may be deemed proper; but without the corporate limits, paving between the rails with boulders, or the Nicholson, or other wooden pavement, shall not be required." (66 v. 217, Section 414.)

Section 2505. "The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections (four and five) of the act of March 27, 1866, entitled 'an act supplementary to an act to provide for and regulate street railroad companies,' on any street or streets where council may deem such

extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connection made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation." (66 v. 140, Section 1.)

Section 3437. "Street railways, with single or double tracks, sidetracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation or unincorporated village; and offices, depots, and other necessary buildings for such railways may also be constructed." (67 v. 10, Section 1.)

Section 3438. "The right so to construct or extend such railway within or beyond the limits of a municipal corporation can be granted only by the council thereof, by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village can be granted only by the county commissioners, by order entered on their journal; and after said grant or renewal of any grant shall have been made, whether by general or special ordinance, or by order of the county commissioners, neither the municipal corporation nor the county commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant, or renewal of a grant, during the term for which said grant or renewal shall have been made." (67 v. 10, Section 1.)

Section 3439. "No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way along which it is proposed to construct such railway, or extension thereof; and the provisions of sections twenty-five hundred and one to twenty-five hundred and five, inclusive, so far as they are

applicable, shall be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route." (65 v. 112, Section 3.)

Section 3440. "When the council or commissioners make such grant, the company or person to whom the grant is made may appropriate any property necessary therefor, when the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway." (63 v. 55, Section 4; 61 v. 53, Section 1.)

Section 3441. "If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied." (67 v. 10, Section 1.)

Section 3442. (**Form of oath in appropriation proceedings.**) * * * (63 v. 55, Section 5.)

Section 3443. "Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated. (67 v. 10, Section 1, 66 v. 140, Section 1.)" (Revised Statutes of Ohio, 1880, Vol. 1, page 886.)

80 *Ohio Laws*, p. 173:

(House Bill No. 515.) *Weitzel Law*

AN ACT

To amend Sections 2502, 3438 and 3439 of the Revised Statutes of Ohio.

SECTION 1. *Be it Enacted by the General Assembly of the State of Ohio*, That Sections 2502, 3438, and 3439

of the revised statutes be, and the said sections are hereby amended so as to severally read as follows:

Section 2502. Nothing mentioned in the next preceding section shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad, shall be taken by the council, except upon the recommendation of the board of public works, in cities having such a board, and of the board of improvements in other municipalities; and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given by the clerk of the corporation, in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation, for the period of at least three consecutive weeks; and no such grant as mentioned in said preceding section shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property-holders upon each street, or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which road is proposed to be constructed; provided, that no grant, nor renewal or any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant.

Section 3438. The right so to construct or extend such railway within or beyond the limits of a municipal corporation can be granted only by the council thereof, by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village can be

granted only by the county commissioners, by order entered on their journal; and after said grant or renewal of any grant shall have been made, whether by general or special ordinance or by order of the county commissioners, neither the municipal corporation nor the county commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant or renewal of a grant during the term for which said grant or renewal shall have been made. Provided, that no authority shall be given by such municipal or county authorities, to occupy the track, whether single or double, or other structure, of any existing street railways for more than one-eighth of the entire distance between the termini of the route, as actually constructed, operated and run over, of the company or individual to whom such grant is made; except, however, in granting permission to extend existing routes in cities of the first, second and third grade of the first class, and first grade, second class, such cities, and the companies owning such route, shall have the same rights and powers they have under the laws and contracts now existing; and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of such city, except as a new route, and subject to the provisions of Sections 2501 and 2502.

Section 3439. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of Sections 2501 and of 2503 to 2505, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old, or the granting of a new route; provided, that this act shall not apply to any county containing a city of the second grade of the second class.

Section 2. That said original Sections 2502, 3438 and 3439 be and the same are hereby repealed; and this act shall take effect and be in force from and after its passage.

O. J. HODGE,

Speaker of the House of Representatives.

R. A. HERR,

President pro tem. of the Senate.

Passed April 18, 1883.

67 Ohio Laws, p. 10:

AN ACT

To amend an act supplementary to an act to provide for and regulate street railroad companies,
passed April 10, 1867.

SECTION 1. *Be it Enacted by the General Assembly of the State of Ohio,* That Section 1 of an act entitled an act to amend an act to provide for and to regulate street railroad companies, passed April 10, 1861, and supplementary thereto, and to repeal Section 7 of said act, be so amended as to read as follows:

Section 1. That street or horse railroads may be located and constructed, part within, part without, or wholly without the limits of any city, town or village; and any such road heretofore or hereafter constructed within, or part within, or wholly without the limits of any city, town or village, whether such village be incorporated or not, may be so constructed or extended along or upon the national road, or any other road, street, avenue, turnpike, public way or ground, in accordance with the provisions of an act entitled "an act to provide for and regulate street railroad companies," passed April 10, 1861; provided, that, before such construction or extension, the company, public officer or public authorities, owning or having charge of any such road, along or upon which said railroad is or may be constructed or extended, shall agree with such railroad company upon the manner, terms and conditions upon which the same shall be occupied or used; and in

cases where such construction or extension shall be along or upon the national road, the board of public works of this state shall agree with such railroad company as to the manner of its use and occupation; but such agreement shall not be necessary to the crossing merely of any such road.

Section 2. That said first section of said supplementary act, passed April 10, 1867, be and the same is hereby repealed.

Section 3. This act shall take effect and be in force from and after its passage.

A. J. CUNNINGHAM,
Speaker of the House of Representatives.

J. C. LEE,
President of the Senate.

Passed February 19, 1870.

58 Ohio Laws, p. 66:

AN ACT

To provide for and regulate street railroad companies.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That any number of natural persons, not less than five, associating to form a company for the purpose of constructing a street railroad, and become incorporated under this act, shall, under their hands and seals, make a certificate, which shall specify as follows:

1. The name assumed by such company, and by which it shall be known. 2. The name of the street, alley, or avenue, with a description of the locality thereon of each terminus of said road, and the names of the streets, alleys, and avenues or other public grounds, through which such road shall pass. 3. The amount of capital stock necessary to construct such road. Such certificate shall be acknowledged before a justice of the peace, and certified by the clerk of the court of common pleas, and shall be forwarded to the Secretary of State, who shall record and carefully preserve the same in his office; and a copy thereof, duly certified by the Secretary of State, under

the great seal of the state of Ohio, shall be evidence of the existence of such company.

Section 2. That when the foregoing provisions have been complied with, the persons named as corporators in said certificate, and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate with succession, with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects named in said certificate, in accordance with the provisions of this act; to make and use a common seal, and the same to renew or alter at pleasure—and do all needful acts to carry into effect the object of the incorporation. Such corporation shall be authorized to construct, operate and maintain a street railroad, with single or double track, on the streets, alleys, or avenues, or other public ground specified in the certificate, with such side-tracks, turn-outs, offices, buildings and depots as they may deem necessary, between the points of terminal named in the certificate, and transport thereon passengers and their packages and baggage.

Section 3. That sections five, six, seven, eight, nine and fourteen, of an act entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, A. D. 1852, are adopted, and made to be part of this act: Provided, that where the words "action of debt" are used in said act, the same shall be taken and construed to be a civil action; and that where public notice is required to be given, the same shall be by publication in a newspaper published in the city, town or village where the street railroad, or one part and terminus thereof, shall be located; and that such companies may borrow money at a rate of interest not exceeding seven per cent. per annum, and may execute a deed of mortgage, or other instrument of writing, to secure the payment of the loan of money so made, or the notes, bonds, or other evidences of indebtedness, that may

be so issued therefor, which said mortgage, or other instrument of writing, may include the personal as well as the real property, and the franchises, including the franchise of being a corporation, of said company; said mortgage, or other instrument of writing, shall be recorded in the office of the recorder of the county in which said railroad is located.

Section 4. That whenever the lines of road of any street railroad companies meet or intersect, and have been or may be constructed so as to admit the passage of cars over such roads continuously, without break or interruption, they are hereby authorized to consolidate themselves into a single corporation, in the same manner provided for the consolidation of railroad companies in sections twenty-one, twenty-two and twenty-three of the said act entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852; and the said sections are adopted and made to be a part of this act.

Section 5. That hereafter, no street railroad shall be constructed or commenced until the consent of the city council or corporate authorities of the city, town or village wherein such road is to be constructed shall have been first obtained; and it shall be competent for the city council or corporate authorities of any city, town or village, to agree with any street railroad company, organized in pursuance of this act, or with any individual or company of individuals, desiring to construct a street railroad in such city, town or village, upon the manner and upon the terms and conditions, upon which such corporation, individual or company of individuals, shall construct and operate a street railroad in such city, town or village: Provided, that no grant to occupy any street, lane or avenue, or public ground in any city of the first class, containing a population exceeding eighty thousand inhabitants, shall be made, except in accordance with sections fifteen and sixteen of an act passed March 3, 1860, relating to cities of the first class, having a population exceeding eighty thousand inhabitants.

Section 6. That any association or company, of not less than five natural persons, who have organized under an act entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, A. D. 1852, and have constructed a street railroad, may accept the provisions of this act, by a vote of a majority of the stockholders or shareholders of such association or company having constructed such road, at a meeting called after TEN days' public notice, given by posting notice in the principal business office of such association or company, and publishing notice in a newspaper published in the city, town or village where such road is constructed; which said vote and proceeding shall be recorded in the books of such association or company, and a copy thereof, under seal of such association or company, be forwarded to the secretary of state; and thereafter, such association or company shall be a body corporate under this act, subject to all the restrictions, requirements and regulations herein provided in operating and maintaining the street railroad of such company, and having and possessing all the rights, powers, privileges and benefits herein granted and conferred, the same as if originally organized and incorporated under this act: Provided, that nothing contained in this section shall be construed to interfere with or impair any lawful obligation which may have been incurred by such company.

Section 7. Street railroads may be located and constructed in part within and in part without the limits of any city, town or village; and any road constructed within the limits of any city, town or village, may be extended without the limits thereof: Provided, that before such railroad shall be constructed upon any road, street, avenue, public way or ground without such limits, the company, or public officer, or public authorities, owning or having charge thereof, shall agree with the railroad company upon the manner and upon the terms and conditions upon which the same shall be occupied or used; but such agreement shall not be necessary to the crossing thereof.

Section 8. The stockholders of every company organized under this act, shall be liable for the dues of such company over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum equal in amount to such stock.

Section 9. This act shall take effect and be in force from and after its passage.

RICHARD C. PARSONS,
Speaker of the House of Representatives.
ROBERT C. KIRK,
President of the Senate.

Passed April 10, 1861.

THE REVISED STATUTES OF OHIO IN FORCE
JANUARY 1, 1890, FROM SMITH & BENEDICT'S
EDITION PRINTED 1892.

Section 2501. (**Terms and conditions of construction and operation to be fixed by council; renewal of grant.**) No corporation, individual or individuals, shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor; and cities of the first and second grade of the first class, and of the second grade of the second class may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest. (1887, March 4; 84 v. 40; Rev. Stat. 1880; 66 v. 217, Section 411; 76 v. 156, Section 4 [S. & S. 137; S. & C. 1560].)

Section 2502. (**Proceedings to establish a street railroad route; grant not valid for more than twenty-five years.**) ~~Nothing~~ Nothing mentioned in the next preceding section shall be: no ordinance or resolution to establish or define

a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon the recommendation of the board of public works in cities having such a board, and of the board of improvements in other municipalities having such a board; and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given by the clerk of the corporation in one or more of the daily papers, if there be such, and if not then in one or more weekly papers published in the corporation, for the period of at least three consecutive weeks; and no such grant as mentioned in said preceding section shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property-holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed; provided, that no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant. (1884, March 20; 81 v. 96; 80 v. 173; R. v. Stat. 1880; 67 v. 77, Section 412; 76 v. 156, Section 5 [S. & C. 1560].)

Section 2503. (Grade of streets when street railroad is constructed.) Before any street railroad shall be constructed, on any street less than sixty feet in width, with a roadway of thirty-five feet, or under, the council shall provide, that the crown of the street shall be made a nearly flat uniform curve, from curb to curb, without

ditch gutters, and in such manner as to give all wheeled vehicles the full use of the roadway up to the face of the curb, after the plan of the streets in the cities of Philadelphia and New York. And on any street, whenever the tracks of two railroads, or of a street railroad and a steam railroad, cross each other at a convenient grade, the crossings shall be made with crossing-frogs of the most approved pattern and materials and kept up and in repair at the joint expense of the companies owning said tracks. (1881, April 20; 78 v. 296; Rev. Stat. 1880; 66 v. 217, Section 413 [S. & S. 139].)

Section 2504. (**Pavement of streets where railroads are constructed.**) The council may require any part or all of the track between the rails of any street railroad, constructed within the corporate limits, to be paved with gravel, boulders, or the Nicholson, or other wooden pavement, as may be deemed proper; but without corporate limits, paving between the rails with boulders or the Nicholson, or other wooden pavement shall not be required. (66 v. 217, Section 414 [S. & S. 139].)

Section 2505. (**Council of city or village may grant extension of street railroad.**) The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections *three thousand four hundred and thirty-seven, three thousand four hundred and thirty-eight, three thousand four hundred and thirty-nine, three thousand four hundred and forty, three thousand four hundred and forty-one, three thousand four hundred and forty-two, and three thousand four hundred and forty-three*, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended and its connections made with other road or roads, by consolidation under existing laws, shall not be increased by

reason of such extension or consolidation. (66 v. 140, Section 1.) (1880, March 9; 77 v. 42, 43; Rev. Stat. 1880.)

Section 3437. (**Where street railways may be constructed.**) Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation or unincorporated village; and offices, depots, and other necessary buildings for such railways may also be constructed. (67 v. 10, Section 1; S. & S. 135.)

Section 3438. (**Who may grant authority to construct same; proviso.**) The right so to construct or extend such railway within or beyond the limits of a municipal corporation ~~shall~~ ^{can} be granted only by the council thereof, by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village can be granted only by the county commissioners, by order entered on their journal; and after said grant or renewal of any grant shall have been made, whether by general or special ordinance, or by order of the county commissioners, neither the municipal corporation nor the county commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant or renewal of a grant during the term for which said grant or renewal shall have been made. Provided, that no authority shall be given by such municipal or county authorities, to occupy the track, whether single or double, or other structure, of any existing street railways for more than one-eighth of the entire distance between the termini of the route, as actually constructed, operated and run over, of the company or individual to whom such grant is made; except however, in granting permission to extend existing routes in cities of the first, second and third grade of the first class, and first grade, second class, such cities, and the companies owning such route, shall have the same rights and powers they have under the laws and contracts now existing; and that no extension of any street railroad located wholly without any *such* city,

or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of *such* city, except as a new route, and subject to the provisions of sections *two thousand five hundred and one* and *two thousand five hundred and two*. (1883, April 18; 80 v. 173, 174; Rev. Stat. 1880; 67 v. 10, Section 1.)

Section 3439. (**Written consent of owners of more than one-half of feet front necessary.**) No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of sections *two thousand five hundred and one* and of *two thousand five hundred and three* to *two thousand five hundred and five*, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route; provided, that this act shall not apply to any county containing a city of the second grade of the second class. (1883, April 18; 80 v. 173, 175; Rev. Stat. 1880; 65 v. 112, Section 3 [S. & S. 139].)

Section 3440. (**When property may be appropriated for such railways.**) When the council or commissioners make such grant, the company or person to whom the grant is made may appropriate any property necessary therefor, when the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway. (63 v. 55, Section 4; 61 v. 53, Section 1; S. & S. 136; S. & S. 137.)

Section 3441. (**The authority controlling the public road must consent.**) If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board

of public works or other public officer, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied. (67 v. 10, Section 1.)

Section 3442. (**Form of oath in appropriation proceedings.**) In case of appropriation of property for such purpose, the oath to be administered to the jury shall be as follows: "You and each of you do solemnly swear that you will justly and impartially assess, according to your best judgment, the amount of compensation which is due to (here name the owner or owners), by reason of the appropriation of the street or avenue (as in the statement described) the company, individual, or company or individuals), and that you will in assessing any damages that may accrue to (here name the owner or owners), by reason of the appropriation, other than the compensation further ascertain how much less valuable the lot or lots of said (here name the owner or owners), will be in consequence of such appropriation." And the jury, in ascertaining such compensation or damages, shall determine the amount thereof without reference to the distinction between a public and a private nuisance, and the effect of such distinction upon the right of such owner or owners to claim compensation or damages, and the court shall, if requested, so direct the jury. (63 v. 55, Section 5; S. & S. 138.)

may be taken from an improvement by said (here name

Section 3443. (**Council, etc., may fix terms and conditions.**) Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated. (67 v. 10, Section 1; 66 v. 140, Section 1.)

GENERAL CODE OF OHIO 1910 IN FORCE AT THE
TIME OF THE PASSAGE OF THE ORDINANCE OF APRIL 21, 1914.

Section 3768. No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance has granted permission, prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys to be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest. (R. S., Section 2501.)

Section 3769. Nothing mentioned in the preceding section shall be done, no ordinance or resolution to establish or define a street railroad route shall be passed, no action inviting proposals to construct and operate such railroad shall be taken by the council, and no ordinance for the purpose specified in such section shall be passed, until public notice of the application therefor has been given by the clerk of the council once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not then in one or more weekly papers published in the corporation. (99 v. 103, Section 30.)

Section 3770. No such grant shall be made, except to the corporation, individual or individuals, that agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed. When

within the year preceding, a street railway has been operated upon such street or part thereof, under a grant or renewal of a grant which has expired or will expire within two years, it shall not be necessary to obtain the consent of the property holders abutting thereon, if the number of tracks on the street, public way or part thereof is not increased beyond the number for which consents were originally obtained. (99 v. 103, Section 30.)

Section 3771. No grant or renewal of a grant for the construction or operation of a street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal, and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipality shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant. (99 v. 103, Section 30.)

Section 3772. If, within thirty days after the passage of an ordinance granting a franchise, extension or renewal thereof, to a street railroad, there is presented to the council or filed with its clerk a written petition signed by fifteen per cent. of the qualified electors of such municipality, to be determined by the highest number of votes cast for the mayor of the municipality at the last preceding municipal election, requesting such ordinance to be submitted to a vote of the electors thereof, the ordinance shall not become operative until it has been so submitted and has received a majority of the votes cast thereon. (99 v. 104, Section 30-a.)

Section 3777. The council of a municipality may grant permission, by ordinance, to any corporation, individual, or company, owning, or having the right to construct, a street railroad, to extend the track, subject to the provisions of law relating to the construction, operation and extension of street railways, within or without, or partly within or without any municipal corporation, on any

street or streets where council deems such extension beneficial to the public. When such extension is made, the charge for carrying passengers on a street railroad so extended and its connections made with any other road or roads, by consolidation, shall not be increased by reason of such extension or consolidation. (R. S., Section 2505.)

INTERURBAN RAILROAD.

Section 3778. The council of any municipality may grant a franchise upon such terms and conditions as it may prescribe for the building of any interurban railroad having, constructing, or building, ten miles or more of track outside of such municipality, to any company or companies using electric or other motive power, save steam, for the purpose of securing to such company or companies access to or terminals within such municipality. The council may authorize such company to build and construct tracks and to operate cars thereon, on any street or streets, or parts of streets, of such municipality, upon which tracks have not already been laid and where the consent of the owners of a majority foot frontage has already been obtained by such company. (98 v. 253, Section 1.)

Section 3779. The council may permit such interurban railroad to make use of the tracks or such parts of the tracks of any existing street railroad company within the limits of the municipality by agreement with such existing company. If no such agreement can be arrived at, the interurban railroad company may be authorized by council to condemn the right to make use of the tracks of such existing company upon the payment of proper compensation. But the interurban railroad company shall be permitted to condemn and make use of not more than one-eighth of the trackage of such company within the municipality, or so much as may be necessary to give the interurban company access to terminals within the mu-

nicipality, or to enable such company to secure a right of way over such tracks through such municipality. The interurban railway company seeking permission to enter or pass through a municipality shall not be required to submit to competitive bidding on such routes. (98 v. 253, Section 1.)

Section 3780. No grant or franchise shall be made to such interurban company for a period longer than twenty years, and no franchise so granted shall be used for the purpose of operating a municipal street car system, it being the only intent hereof to provide a method whereby bona fide interurban railroads may gain access to, and a terminal within, and an exit from, a municipality. (98 v. 253, Section 1.)

Section 9100. Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation. Offices, depots, and other necessary buildings therefor, also may be constructed. (R. S., Section 3437.)

Section 9101. The right to construct or extend such railway within or beyond the limits of a municipal corporation, may be granted only by its council, by ordinance; the right to construct such railway without the limits of a municipal corporation may be granted only by the county commissioners, by an order entered on their journal. (96 v. 31, Section 29.)

Section 9102. After such grant, or the renewal of any grant has been made, by general or special ordinance, or the order of county commissioners, neither the municipality nor commissioners shall release a grantee from any obligations or liabilities imposed by the terms of the grant, or renewal of any grant, during the term for which such grant or renewal was made. (96 v. 31, Section 29.)

Section 9103. No right shall be given by such municipal or county authorities to occupy the track, single or double, or other structure, of existing street railways for more than one-eighth of the distance between the termini of the route, as actually constructed, operated and run over, of the company or person to whom such grant is made. But in granting permission to extend existing routes in cities, the cities and companies owning such route shall have all the rights and powers which they possess under existing laws and contracts. (96 v. 31, Section 29.)

Section 9104. No extension of a street railway located wholly outside of a city, or of one wherever located, which is built in pursuance of a right obtained from authority other than that of a municipal corporation, shall be made within the limits of such city, except as a new route. (96 v. 31, Section 29.)

Section 9105. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed *to construct* such railway or extension thereof; and the provisions of all ordinances of the council relating thereto, have in all respects been complied with, whether the railway proposed is an extension of an old or the granting of a new route. (R. S., Section 3439.)

Section 9106. But when such grant is made by the council of a municipal corporation, either for a new route or as an extension of an existing route, on and along any part of a street or public way upon which a street railway has been operated within one year preceding under a grant or renewal of a grant which has expired or within two years will expire, it shall not be necessary to produce to the council any written consents from the owners of the lots and land abutting on such

part of a street or public way; in case the number of tracks thereon or part thereof is not increased beyond the number for which consents originally were obtained. (R. S., Section 3439.)

Section 9107. (When property owner can not withdraw consent.)

Section 9108. When the council or commissioners make such grant, the company or person to whom it is made may appropriate property necessary therefor, if the owner fails expressly to waive his claim to damages by reason of the construction and operation of the railway. (R. S., Section 3440.)

Section 9109. Such power to appropriate may be exercised, for the purpose of constructing a street railway along a highway occupied by a turnpike or plank road company when the person, persons or company authorized to construct such railway can not agree with the turnpike or plank road company on the terms and conditions upon which the highway may be occupied, and if such appropriation will not unnecessarily interfere with the reasonable use of the highway by the turnpike or plank road company. Nothing in the foregoing provisions shall affect the rights of property owners to give or withhold their consent concerning the right of way for street railways upon any street or road. (R. S., Section 3440.)

Section 9110. (Oath in appropriation proceedings.)

Section 9111. (How compensation ascertained.)

Section 9112. If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer, such person, company, or officer may agree with the person or com-

pany constructing the railway as to the terms and conditions upon which the road may be occupied. (R. S., Section 3441.)

Section 9113. Council, or the commissioners, as the case may be, may fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated. (R. S., Section 3443.)

Section 9114. (Free transportation of police and firemen.)

Sections 9115 and 9116. (Provide for the change of location to avoid certain dangers.)

Section 9117. Companies incorporated under section eighty-six hundred and twenty-five, for such purpose, may construct, maintain and operate electric street railroads, or street railroads using other than animal power as a motive power, for the transportation of passengers, packages, express matter, United States mail, baggage and freight upon the highways in this state outside of municipalities, or upon private rights of way. (R. S., Section 3443-8.)

Section 9118. Such companies may occupy and use for their tracks, cars, necessary fixtures and appliances, the public highways outside of cities and villages with the consent of the public authorities in charge of or controlling such highways, and with the written consent of the majority, measured by the front foot, of the property holders abutting on each of such highways. (91 v. 285, Section 2.)

Section 9119. (When necessary to enter upon and use private property in the construction and operation of such roads, such companies shall have the same power of appropriation that steam railroad companies possess.) (R. S., Section 3443-10.)

Section 9120. Such companies may lease, purchase, or make traffic arrangements with any other street railway company as to so much of its tracks and other property as is necessary or desirable to enable them to enter or pass through a city or village, upon the terms and conditions applicable to other street railways. Any existing street railway company, owning or operating a road shall receive the cars, freight, packages or passengers of any other road, upon the same terms and conditions as they carry for the general public. (91 v. 286, Section 4.)

Sections 9121 and 9122. (Consolidation.)

Section 9123 to Section 9126, inclusive. (Provisions touching street and railroad crossings.)

Sections 9127, 9128 and 9129. (Consolidation.)

Section 9130. (Interurban road may contract for use of tracks in cities.)

Section 9131. (Privileges and obligations of the street railway apply.)

Section 9132. (Not necessary to obtain additional grant.)

Section 9133. (Fares in such cases.)

Sections 9134, 9135, 9136 and 9137. (Lease or purchase of other companies.)

Section 9138. (Agreement with other companies.)

Section 9139. (Fare not to be increased.)

CONTROL OF STREETS.

Bates Revised Statutes of Ohio, Third Edition. (1900.)

Section 2640. (**Council to have control of streets, etc.**) The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance. (66 v. 222, Section 439.)

Smith & Benedict, Revised Statutes of Ohio. (1890.)

Section 2640. (**Council to have control of streets, etc.**) The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance. (66 v. 222, Section 439.)

Bates' Revised Statutes of Ohio, Sixth Edition. (1906.)

(1536-131) M. C. Sec. 28. (**Council to have control of streets, etc.**) In all municipal corporations council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation, and shall cause the same to be kept open and in repair and free from nuisance; and with respect to the dedication, opening and vacation of streets, as well as labor upon them, Sections 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2649-1, 2649-2, 2649-3, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2660, 2661, 2662, 2664, 2664-1, 2664-2, 2664-3, 2664-4, 2664-5, 2664-6, 2664-7, 2664-8, 2664-9, 2664-10, 2664-11, 2664-12, 2664-13 and 2664-14 shall be and remain in full force and effect. (96 v. 31, Section 28, October 22, 1902; in effect May 4, 1903.)

General Code of Ohio, 1910, in force 1914.

Sec. 3714. Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have

the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance. (96 v. 26, Section 9; 96 v. 31, Section 28.)

QUO WARRANTO.

Bates' Revised Statutes of Ohio, Third Edition. (1900.)

Section 6761. (**Where action of quo warranto may be brought against a corporation.**) A like action may be brought against a corporation:

1st. When it has offended against a provision of an act for its creation or renewal, or any act altering or amending such acts.

2d. When it has forfeited its privileges and franchises by non-user.

3d. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises.

4th. When it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege or right in contravention of law. (1881, March 9; 78 v. 43; Rev. Stat. 1880; 36 v. 68, Section 8; S. & C. 1266.)

Section 6762. (**Who may commence action.**) The attorney-general, or a prosecuting attorney, when directed by the governor, Supreme Court, or General Assembly, shall commence any such action; and when, upon complaint, or otherwise, he has good reason to believe that any case specified in (the preceding section) can be established by proof, he shall commence an action. (36 v. 68, Sections 1, 8; 50 v. 267, Sections 9, 10, 11, 12; S. & C. 1264; S. & C. 1266.)

Section 6763. (**Upon whose relation.**) Such officer may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under the first subdivision of section sixty-seven hundred and sixty, he may require security for costs to be given as in other cases. (36 v. 68, Section 1; S. & C. 1264.)

Section 6774. (**Judgment where office, franchise, etc., found to have been usurped.**) When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising, an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs. (36 v. 68, Section 15; S. & C. 1268.)

Section 6780. (**Judgment when corporation has forfeited its rights.**) When in any such action, it is found and adjudged that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges, and franchises, or has not used the same during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved; and when it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture, or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense, or the exercise of such power. (43 v. 94, Section 1; S. & C. 1271.)

C. C. C. & ST. L. RY. CO. V. URBANA, B. & N. RY.
CO., 5 C. C. REP. (N. S.), P. 583, AFFIRMED
73 O. S., 364:

"Laws relating to grants of street railway franchises and routes established by municipalities must have uni-

form operation throughout the state, which renders unconstitutional the amendments to Sections 3437 and 3439, and also the amendment to Section 2502." (Syl. 3.)

"In case of conflict as to municipal lines or extensions, the general provisions of Section 3437, *et seq.*, must yield to the more specific provisions of Section 2505, *et seq.*" (Syl. 4.)

"A steam railroad company in an action to enjoin a street railway company from constructing and operating a street railway over its tracks may raise the question whether the notice provided by Section 2502 (repealed, 96 O. L., 96) is a condition precedent to a municipal grant to such street railway company. But an extension of an interurban electric railway into or through a municipality is an original line, and the notice provided for in Section 2502, and also required by Section 3739 as a condition precedent to the granting of a franchise over the streets of the municipality, must be given." (Syl. 5.)

In the opinion the court said (p. 590):

"3. Was notice as provided by Section 2502, Revised Statutes, necessary as a condition precedent to the passage of the Ordinance of October 21, 1902? No such notice was given, and since plaintiff will suffer some inconvenience from the construction as well as operation of the street railway, plaintiff is a proper party and in this action has the right to raise the question.

To answer the question will require a brief review of the street railway legislation of this state. Prior to March 3, 1860, all street railways in this state were constructed either by (P. 591) individuals or by corporations organized under special legislative charters passed before the present Constitution was adopted, or by corporations organized under the general corporation act passed May 1, 1852. No express power or authority was conferred upon municipalities to grant the use of the streets to any such company or individual prior to March 3, 1860, and the right of such use and occupancy if derived from

municipal authority, must have been granted under the general authority to control the streets. On the date last mentioned there was passed 'An act relating to cities of the first class having a population exceeding 80,000 inhabitants' (57 O. L., 16). In Sections 15 and 16 of this act, power to grant the use of the streets for street railway purposes and to prescribe by ordinance the terms and conditions of such occupancy is given with the requirement of 'consents,' notice of applications and bids, and it is prudently provided that 'all reductions of the rates of fare shall inure to the benefit of the passengers carried.'

April 10, 1861 (58 O. L., 66), an act entitled "An act to provide for and regulate street railroad companies" was passed. Section 5 of this act requires the consent of the council or corporate authorities of the city, town, or village wherein such railroad is to be constructed, is to be constructed before such road is constructed or commenced, and said company may agree as to terms and conditions upon which the streets are used and the road operated. Cities of 80,000 population are excepted from the operation of the act. Section 7 provides that street railways may be located and constructed in part within, and in part without, the limits of any city, town or village, and any railway constructed within the limits of any city, town or village, may be extended within the limits thereof. Provided, that before so extended, the company, or public officer or public authorities owning or having charge of any road, street, avenue, public way or grounds without such limits shall agree upon the terms and conditions upon which the same shall be occupied or used.

March 27, 1866 (63 O. L., 55), an act supplementary to the foregoing was passed by Section 6, of which Sections 15 and 16 of the act of 1860, and Section 5 of the act of 1861, were (p. 592), expressly repealed. This act relates only to the construction of street railways within municipalities. Section 1 requires consent of the council. Section 2 requires the council to prescribe terms and conditions of use, public notice of intent to make the grant, and that no such grant shall be made except to the indi-

vidual company or corporation that will agree to carry at the lowest rates of fare. Section 3 requires the consents, in writing, of a majority of the owners of abutting lots, to be filed with the council and the council shall so declare, by resolution or ordinance, before the road is constructed, unless by Section 4, by proper proceedings, the damages of the persons not consenting and waiving damages, are determined, and the rights of such persons acquired in and by appropriation proceedings. Section 5 regulates the procedure.

April 10, 1867 (64 O. L., 122), Section 7 of the act of April 10, 1861, was amended and the original section repealed. The extent of the amendment is not here material.

April 28, 1868 (65 O. L., 112), Section 3 of the act of March 27, 1866, was amended so as to require the filing of written consents by a majority in interest as a condition to granting the franchise.

May 7, 1869 (66 O. L., 149), the municipal code was passed. Sections 411 to 414 of this code regulate street railroads. These sections, in order, to provide that, upon written application by a company, the council may grant permission to construct such railway and prescribe terms and conditions upon which, and the manner in which the same shall be operated; that no such ordinance shall be passed until notice of the application has been given, and no such grant shall be given except to the company, etc., that will agree to carry at lowest rates of fare. The remaining sections relate to the grade of the streets and paving between the rails. Sections 1 and 2 of the act of March 27, 1866, were repealed by this code. On the same day that the municipal code was passed, and Sections 1 and 2 of said act repealed, there was passed another act (66 O. L., 140) as follows:

"It shall be lawful for the council of any city or incorporated village to grant permission by ordinance to any person (p. 593) or company owning or having the right to construct any street railroad, to extend their tracks, subject to the provisions of Sections 4 and 5 of said act

passed March 27, 1866, on any street or streets where the said council shall deem such extension beneficial to the public. And when any such extension shall be made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation: said sum shall include the government tax."

February 19, 1870 (67 O. L., 10), the act of April 10, 1867, amending Section 7 of the act of April 10, 1861, was amended in part as follows: "Street or horse railroads may be located and constructed, part within, part without, or wholly without the limits of any city, town or village; and any such road heretofore or hereafter constructed within, or part within, or wholly without the limits of any city, town or village. * * * may be so constructed or extended along or under the National road, or any other road, street, avenue, turnpike, public way or ground, in accordance with the provisions of an act entitled 'an act to provide for and regulate the street railroad companies, passed April 10, 1861: provided, that, before such construction or extension, the company, public officer or public authorities, owning or having charge of any such road, * * * shall agree with such railroad company upon the manner, terms and conditions upon which the same shall be occupied or used'; and in case the National road is used the board of public works of the state shall so agree. In this state of the law the Revised Statutes were passed as a single act. Sections 411, 412, 413 and 414 of the Municipal Code with some amendments became Sections 2501, 2502, 2503 and 2504, Revised Statutes.

The act (66 O. L., 112), was amended to read as follows:

"No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consents of the owners of more than one-half of the feet front of the lots and lands abutting on the street

or public way along which it is proposed to construct such railway or extension thereof; and the provision of Sections 2501 and 2503 to 2505, Revised Statutes, inclusive, so far as they are applicable, shall (p. 594), be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route."

This amendment became Section 3439, Revised Statutes.

March 9, 1880, Section 2505, Revised Statutes, was amended so as to make the extension therein provided for, subject to Sections 3437 to 3443, Revised Statutes, inclusive, instead of subject to Sections 4 and 5 of the act of March 27, 1866, as theretofore therein provided. It will be noted that now Section 2505, Revised Statutes, makes extensions within municipalities subject to Section 3439, Revised Statutes, *et seq.*, and Section 3439, Revised Statutes, is subject to Section 2505, Revised Statutes, *et seq.*, whenever the same shall be applicable.

It is very evident that Sections 2501 to 2505, Revised Statutes, inclusive, standing alone, relate to street railway lines located and extended wholly within municipalities, while Section 3437, Revised Statutes, *et seq.*, relate to all lines and extensions wherever located. In case of conflict as to city lines or extensions, the more general provisions of Section 3437, Revised Statutes, *et seq.*, must yield to the more specific provisions of Sections 2501, Revised Statutes, *et seq.* Section 2505, Revised Statutes, relates expressly and exclusively to extensions within a city of original city lines. It is evident as this section was first enacted and as the same was first carried into the Revised Statutes of 1880, no notice was required to be given of an application for an extension. The act being made expressly subject to Sections 4 and 5 of the act of May 27, 1866, it will not be presumed that it was subject to other sections of the same act not specified. Nor will the fact that it was placed by the codifiers after Sections 2501 to 2504, Revised Statutes, have the effect to alter its construction or meaning. *Allen v. Russell*, 39,

Ohio St., 336, 337; *State v. Auditor of Darke Co.*, 43 Ohio St., 311, 315; *State v. Stockley*, 45 Ohio St., 304, 308, 309.

When Section 2505, Revised Statutes, was last amended, if it was desired to make the same subject to Section 2502, Revised Statutes, as to notice, the arrangement of the sections would certainly have suggested a direct reference to Section 2502, Revised Statutes, in terms. Instead of this, the operation of the section is expressly made subject as stated to Section 3439 (p. 395), Revised Statutes *et seq.*, and Section 3439, Revised Statutes requires that the provisions of Section 2502, as well as Section 2505, Revised Statutes, shall be observed in extensions or new routes granted.

Since Section 3439, Revised Statutes, refers to new routes, and Sections 2501 to 2504, Revised Statutes, relate to new routes, and the same section (Section 3439, Revised Statutes) refers to extensions, and Section 2505, Revised Statutes, relates to extensions, it would seem that the fair rendering of Section 3439, Revised Statutes, upon the point now under consideration, is the same as though the concluding clause were, "and the provisions of Section 2501 to 2504, Revised Statutes, inclusive, in the granting of a new route, and Section 2505 in granting an extension, so far as said sections are applicable shall be observed in all respects." The history of the legislation, as well as the language of Section 3438, Revised Statutes, shows that an extension from without, into or through a municipality, is, as to the part of the line within the municipality, a new route. At the very most it can not be contended that Section 3439, Revised Statutes, requires the observance of Section 2502, Revised Statute *et seq.*, only when the same are applicable. They are not applicable in all cases covered by Section 3439, Revised Statutes, to-wit, a line constructed wholly without a municipality or an extension of such line not into or through a municipality. In such case municipal officers would have no duty in the premises and the sections only enjoin duties upon such officers. In still other cases of extensions the provisions of Section 2502,

Revised Statutes, relates only to extensions and these may be granted. An extension can only be predicated of an existing line or a present right to construct a line. The statute does not make the right to grant an extension depend upon the fact that there are two or more owners of existing lines or of two or more present rights to construct lines in the municipality.

(P. 596.) The notice required by Section 2502, Revised Statutes, is a means to secure reduced fares by competitive bidding. To bidding there must be at least two qualified bidders. In the case at bar there is neither pleading or proof that when the ordinance of October 21, 1902, was passed, there was any person, persons or corporations other than defendant that could make application for the Columbus Avenue extension or could receive a grant of it as an extension. Again, if there were two or more such corporations or persons, their lines existing or proposed would not be identical.

By Section 2505, Revised Statutes, a trip for a single fare over the original line and over the extension is contemplated. If notice were given and bids received each company would bid for a trip over its own line, plus the extension proposed. Since each original line would be different, the bidders would submit their proposal not with reference to the same but a different service. In such case it would be impossible to determine whose bid was "the lowest." But Section 2505, Revised Statutes, does not omit reference to fare, nor omit a means by which the charge is to be fixed. It has an express provision upon the subject:

"The charge for carrying passengers on any street railway so extended * * * shall not be increased by reason of such extension."

In the absence of all regulation such company could exact a reasonable fare. The function of legislation is to limit. When regulation is attempted, and a specified charge prohibited, or a limit fixed, any charge within the limit or not prohibited may be exacted. Hence, the pro-

vision quoted, that the rate of fare fixed for the original line, shall not be increased upon the line as extended, is by construction tantamount to a provision that the former charge need not be reduced by reason of the extension.

Terms implied from the express terms of a statute are as much a part of the statute as the express terms themselves. By the terms express and implied of Section 2502, Revised Statutes, the rate of fare is fixed for the extended line. And for (p. 597) this as well as the other reasons heretofore stated, it results that to give notice of the application for an extension in the case at bar, would be a vain thing. The observance of Section 2502, Revised Statutes, as to notice is then not required by Section 3439, Revised Statutes, in the case at bar, because it is not in any degree applicable. If the extension *were from an original line wholly without the municipality, into or through the municipality, such extension would be, as to such municipality, an original line or new route, and in such case, Section 2502, Revised Statutes, and the other sections would apply.* But that is not this case. 91 O. L., 285, Section 6."

Office Supreme Court, U. S.

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JAMES D. MAHER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. ~~226.~~ 37

THE CITY OF CINCINNATI, APPELLANT,

versus

THE CINCINNATI & HAMILTON TRACTION COM-
PANY ET AL., APPELLEES.

REPLY BRIEF FOR THE CITY OF CINCINNATI,
APPELLANT.

CHARLES A. GROOM,

Solicitor of Cincinnati;

CONSTANT SOUTHWORTH,

Assistant Solicitor of Cincinnati,

Counsel for the City of Cincinnati, Appellant.

(24,344)

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SUPREME COURT OF THE UNITED STATES.

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No. 226.

CITY OF CINCINNATI, APPELLANT,

vs.

THE CINCINNATI & HAMILTON TRACTION COM-
PANY ET AL., APPELLEES.

**REPLY BRIEF FOR THE CITY OF CINCINNATI,
APPELLANT.**

The brief for the appellees having been served within less than seven days before the hearing of this case, we ask the court's indulgence for this very summary reply brief.

I.

THE DISMISSAL OF A QUO WARRANTO PROCEEDING IS NOT RES ADJUDICATA IN OHIO.

STREET RAILWAY FRANCHISES IN OHIO, WHEN NOT LIMITED IN POINT OF TIME, ARE DETERMINABLE AT THE WILL OF THE GRANTOR.

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY CASE.

In the city's brief in chief (p. 34 and following) we have shown that the law of Ohio is as above stated, citing several cases beginning with *Ohio ex Rel. vs. The Cincinnati Gas Light and Coke Company*, 18 Ohio St., 262. Appellees attack this at some length (p. 30 and following of their brief). This attack, however, and the argument in support thereof may now be wholly disregarded, for the Supreme Court of Ohio has very recently again passed on this question, holding as claimed by the city. In the case of *State ex Rel. vs. Ohio Traction and Light Company*, No. 14114, Supreme Court of Ohio, decided October 19, 1915 (see memorandum decision, 13 Ohio Law Reporter, 419), the question was squarely adjudged. We will hand this court a copy of the printed record in that case. An examination of that record will show that the Supreme Court of Ohio passed on two points directly involved in the case at bar. The cited case was a *quo warranto* proceeding instituted by the prosecuting attorney of Stark County, Ohio, against the Northern Ohio Traction and Light Company, "engaged in operating an interurban electric railroad in Stark County, in the State of Ohio, on a public highway known as the Canton Massillon road, between the cities of Massillon and Canton" (Record, No. 14114, Supreme Court of Ohio, pp. 3, 4). In this cited case it appears from the averments of the pleadings and also from the evidence (see, for instance, p. 11 of said record) that the County Commissioners' grant was made February

22, 1892, and that it was without limit in point of time. Twenty-five years had not expired when this proceeding was brought. The answer which appears in the record in the Ohio case, pages 14 and 15, contained the following averment:

"First Defense.

"That on the 1st day of April, 1913, in an action in the Court of Appeals in and for Stark County, Ohio, wherein the State of Ohio on the relation of the then prosecuting attorney for Stark county, Ohio, Charles Krichbaum was plaintiff, and this defendant was defendant, upon the same cause of action alleged in the petition herein and involving the same subject-matter as this action said action in said court being number 928 upon the docket of said court, said Court of Appeals entered a final judgment on the merits thereof, dismissing said plaintiff's petition, and holding therein that the grant or franchise under the resolution of February 22nd, 1892, of the County Commissioners of Stark County, set forth in the petition herein, is a perpetual grant to William A. Lynch, his successors and assigns, and that this defendant as the owner of said grant has a valid right to operate its electric railroad between the cities of Canton and Massillon, Ohio.

"All of the issues so decided in and by said judgment were directly raised and necessarily involved in said action. Said judgment has not since been reversed or modified, and is still a final judgment between the parties hereto upon the cause of action set forth in the petition herein. Said judgment is a bar to this action and by reason of the holdings of said judgment the plaintiff herein is estopped to deny that said grant by and under a resolution adopted by the Board of County Commissioners of Stark County on February 22nd, 1892 (which resolution is set forth in the petition herein), is a perpetual and assignable grant, and that this defendant is the true and lawful owner of said grant."

The answer also claimed that the grant made by the County Commissioners of Stark County was a perpetual grant. But more of this below.

The earlier case referred to in the above-quoted first defense of the Northern Ohio Traction and Light Company is found in the record in the Ohio case on page 49 and following. It discloses that the two cases were for the identical object, and that in the earlier case the State was unsuccessful.

The judgment of the Supreme Court of Ohio was announced October 19, 1915 (13 Ohio Law Reporter, 419), and a copy of the memorandum thereof appears below herein. The Supreme Court of Ohio found for the relator "upon the issues joined." The Supreme Court necessarily held the first defense bad, and that the earlier *quo warranto* proceeding was no bar. This is exactly the contention made by the city in the case now on hearing, excepting that the Northern Ohio Traction and Light case is much stronger and goes farther than the city need go in its claim. For in the Cincinnati case, between the time of the *quo warranto* case relied on by the appellees and the beginning of the controversy out of which this suit arises, there had occurred, among other important events, the following, to wit, the expiration of the twenty-five-year period; on the other hand, in the Northern Ohio Traction and Light case there was no such difference between the two proceedings.

Besides this, we call attention to the fact that the judgment in the earlier *quo warranto* case in the matter of the Northern Ohio Traction and Light Company was one of dismissal (page 75 of the record in the Northern Ohio Traction and Light Company case). Likewise, in the *quo warranto* case relied upon by appellees in the instant case, the judgment was one of *dismissal* (see copy of the judgment entry, page 19 of the brief for appellees, bottom, and pages 178 and 179 of the record in this court).

**Street Railway Franchises Without Limit in Time Are
Determinable at the Will of the Grantor.**

The above-cited Northern Ohio Traction and Light Company case is, however, a still more important authority for the city because of the square holding, as above stated, against perpetual grants. In the earlier *quo warranto* case the contrary decision had been reached (15 Ohio Circuit Court, New Series, 577). It was there held that such a franchise was perpetual.

The Supreme Court of Ohio, however, followed the case of the *Gas Company vs. City of Akron* (81 Ohio St., 33), which holds that such a franchise is determinable at will. This Gas Company case is cited several times by the city in its brief in chief (pages 8, 49, and 51). See more especially the extract quoted on page 49 of the city's brief in chief and also the syllabus in the gas case.

The foregoing, however, is not the most important aspect of this Northern Ohio Traction and Light Company decision. The case in the lower court, which never was the law of Ohio, was, unfortunately for the city, cited and relied on by the trial judge in the case at bar (see references to erroneous decision in 15 Circuit Court, New Series, 577, in Judge Sater's opinion, record, pages 30 and 31). Judge Sater regarded this case as of peculiar significance because it construed the same sections of the statute as here involved in the case at bar and Judge Sater pointed out that the franchises involved in the two cases were granted within three years of each other, to wit: 1889 in the case at bar, and 1892 in the Northern Ohio Traction and Light Company case (see the discussion of the question by the court on page 31 of the record in the case at bar). Judge Sater refers to this Northern Ohio Traction and Light Company case three times in his opinion, the first reference being in the third paragraph thereof. He was undoubtedly misled by this case and believed he was following the Ohio de-

cisions when as a matter of fact he was not. This initial vice permeates the entire opinion. It is carried into the decree, wherein certain of the franchises claimed by appellees are adjudged to be perpetual, notwithstanding the grant under which they are claiming *did not contain words of perpetuity*. This County Commissioners' grant (see Record, page 14) on which the appellees lean so heavily was *not* even in terms made to the grantee, its successors and assigns.

And yet the trial court not only granted the relief prayed by the appellees in their bill filed below, but proceeded to adjudge to them perpetual rights in certain streets!

The following is a certified copy of the judgment in the Supreme Court of Ohio in the cited case:

"Supreme Court of State of Ohio of the Term of
January, A. D. 1915, to wit: Tuesday, October
19th.

"STATE OF OHIO,
"City of Columbus, ss:

No. 14114.

"THE STATE OF OHIO *ex Rel.* HUBERT C. PONTIUS,
Prosecuting Attorney of Stark County,

vs.

"THE NORTHERN OHIO TRACTION AND LIGHT
COMPANY.

In Quo Warranto.

"This cause came on to be heard on the pleadings and the stipulation of the parties and was argued by counsel. On consideration whereof, the court finds upon the issues joined in favor of the plaintiff on the authority of *Gas Company vs. The City of Akron*, 81 Ohio St., 33.

"It is, therefore, ordered and adjudged that the said defendant be ousted from the exercise and use of the rights, privileges and franchises described in

the petition of the plaintiff in the operation of the interurban electric railroad therein described, and it is hereby ordered to remove its tracks and switches from the said Canton and Massillon road between the corporate limits of the said cities of Canton and Massillon within ninety days from this date.

"It is further ordered and adjudged that the plaintiff recover of the defendant its costs herein taxed to \$—.

* * * * *

"I, Frank E. McKean, clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said court, to wit: from Journal No. 27, page 182.

"In witness whereof, I have hereunto subscribed my hand and affixed the seal of said Supreme Court, this 10th day of November, A. D. 1915.

"Duly stamped and sealed.

"FRANK E. MCKEAN.

"*Clerk Supreme Court of Ohio.*"

In deciding as above the Supreme Court of Ohio only followed the strong intimation made by that court many years ago to the same effect. Thus in the case of *State ex Rel. vs. The Columbus Railway Company* (1 Ohio Circuit Court, New Series, 145), the lower court having held that a street railway grant prior to May 14, 1878, was perpetual unless its term was expressly limited, the Supreme Court of Ohio, in 73 Ohio St., 363, while affirming the lower court, expressly did *not* approve of the doctrine announced by the lower court as to the perpetuity of the franchise. The Supreme Court said that the judgment was "affirmed on the sole ground that defendant had *present right* to occupy the streets at the time of the commencement of this action. The other questions presented *are not decided*" (73 Ohio St., 363).

Before leaving this Northern Ohio Traction and Light Company case it might be proper to note the fact that Judge

Sater in his opinion made a curious suggestion that as to the short section of line shown on the inset map on the plat (Exhibit A), of which a copy is attached to the brief in chief for the city, namely, that "the right of the plaintiffs to operate their cars over said 241 feet exists, and, in my judgment, will continue so long at least as any indebtedness incurred in good faith on the strength to so operate is outstanding, my understanding from counsel being that the plaintiffs have bonded their roads, including the 241 feet in question" (Record, page 40). The court intimated that a grant by estoppel might thus exceed the twenty-five-year limit for which an express grant in Ohio might run, and that such grant by estoppel might last as long as a bond issue might run. This seems a most remarkable doctrine, for, as shown in the brief in chief on page 39 and following, estoppel cannot confer an unknown power upon a municipality.

We mention the case of the Northern Ohio Traction and Light Company in this connection because on page 45 and especially page 91 and following, including page 95 and following, there were shown to have also been present mortgages on the traction line there attacked. Of course, the answer to the suggestion is that one contracting with a municipal corporation is bound to know the limits of its power (see the Ohio and other cases cited, pages 40 and 42 and following, in the city's brief in chief; see also a square holding to this effect in *Village of Carthage vs. Dickmeier*, 79 Ohio St., 323).

As well said by Mr. Justice Holmes:

"By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject not paramount to proviso for repeal" (*Calder vs. Michigan*, 218 U. S., 591, 599).

II.

THE OHIO STATUTES REQUIRE THE CITY OR VILLAGE TO CONSENT TO THE OPERATION OF THE STREET RAILWAY LINE WITHIN ITS LIMITS.

Appellees claim that the Ohio statutes authorized the County Commissioners of Hamilton County to grant a franchise on a county road, even within the limits of cities and villages. Such a rule would result in disastrous confusion and conflict between municipal and county grants, and would place street railroad companies in a delightful twilight zone, between county and municipal control, wherein any obnoxious franchise limitation could be litigated, among other reasons, in order to decide just what are and what are not county roads.

Fortunately for the city of Cincinnati, and since the judgment below, the Supreme Court of Ohio has passed on this question, taking the view for which the city contends.

In the case of the *Interurban Railway and Terminal Company vs. The City of Cincinnati*, No. 14,792, in the Supreme Court of Ohio, the court had before it the question as to the power of a village to impose on a strictly interurban company, a condition providing the rates of fare to the Cincinnati terminals on annexation. In a valuable and careful opinion the Supreme Court of Ohio discussed the questions now before this court in the instant case. The decision in the *Interurban Railway and Terminal Company* case has not yet been officially reported. The decision of the lower court is reported in 15 Ohio, *nisi prius*, New Series, 241, and the affirmance by the Supreme Court of Ohio was on November 19, 1915, and was noted in 13 Ohio Law Reporter, 467. A certified copy of the opinion in the *Interurban* case is printed and filed herewith as appel-

lant's Appendix No. 2. The following brief quotations from that opinion are controlling, we submit, in the case at bar.

The Supreme Court of Ohio State, after alluding to the fact that the first interurban street railroad act was passed in 1894 (91 Ohio Laws, 285), proceeded to say:

"It follows that as to the *villages*, the construction or extension of an interurban road was then controlled by the general terms of sections 3437 to 3443, Revised Statutes, and that the *village council* was empowered to grant the right to construct or extend the line within or beyond the limits of the village, and by section 3443 to fix the terms and conditions thereof."

The Supreme Court of Ohio then proceeds to quote and follow *Railroad Company vs. Commissioners* (56 Ohio St., 1), the extract therefrom in the opinion showing that the city is correct in its reliance on said case as set out on pages 17 and 18 of the city's brief in chief.

The Supreme Court of Ohio in the *Interurban* case proceeded to say:

"In the absence of statutory provision to the contrary a *village* was empowered to stipulate as one of the 'terms and conditions' which it was authorized to fix by the provisions of section 3443, Revised Statutes, for a certain rate of fare for a road from any point in its limits to a point outside its limits."

Curiously appellees have cited no reported decision in Ohio or elsewhere holding that the County Commissioners' grant has the power within the village or city which they contend for. Even the trial judge in the case at bar did not so state in his opinion (Record, page 29). The Ohio decisions are the other way, as is shown by the above-cited cases and the other cases collected in the city's brief in chief (pages 14-23).

Even without the foregoing decisions it would seem plain

that the result necessarily follows from an examination of the Ohio statutes as they existed in 1889, when the county and the village of Carthage grants were made. We note that in appellees' brief, on page 16, and again on pages 33 and 34, the claim is made that the scope of the County Commissioners' grants was determined by sections 3441 and 3443, Revised Statutes, and they say these sections provide power for the County Commissioners to supersede that of the village authorities in the case of county roads. It will be noted that the sections they rely on are specifically referred to in the *Interurban* case above quoted, and there held not to give this superior power. Also, as a matter of fact, in the *Interurban* case the line of the Interurban Railway was along the Montgomery turnpike, which was a county road and also a through highway of great importance (see the decision of the Supreme Court of Ohio in the case of *Commissioners vs. State*, 50 Ohio St., 653).

But to continue with our argument with reference to the history of sections 3441 and 3443. Besides relying on these sections, section 3439 is also referred to on page 34 of appellees' brief.

That the amendment of said section 3438 refers to section 2502 of the Revised Statutes of Ohio and thus includes the twenty-five-year limit and the requirement of the municipal consent is shown on page 21 of the city's brief in chief. It is also shown by the reference to the amending act (80 Ohio Laws, 173), found in Appendix No. 1 to the city's brief on pages 5 and 6 (see the proviso in the statute, and see also section 3438 with the proviso as expressed in the Revised Statutes of 1890, page 15 of the city's first appendix).

Sections 3441 and 3443, Revised Statutes, as they existed at the time will be found on pages 3 and 4 of the city's first appendix, and also on pages 16 and 17 thereof, the same being quoted respectively from the Revised Statutes of 1880 and from those of 1890. It will be observed that in each instance the history of the section is referred to in

the parenthetical reference at the end thereof. It there appears they all go back to 67 Ohio Laws, 10. 67 Ohio Laws, 10, is found in the said Appendix No. 1 on page 7. This act was passed February 19, 1870, and provided for the extension of street or horse railroads within or without, or partially within or without, municipalities, saying, however, that these grants should be "in accordance with the provision of the act entitled 'An act to provide for and regulate street railway companies,' passed April 10, 1861." This act of April 10, 1861, is copied on page 8 and following of the city's Appendix No. 1, and provides in section 5 "that hereafter no street railroad shall be constructed or commenced *until the consent of the city council or corporate authorities of the city, town, or village wherein said road is to be constructed shall be first obtained.*" * * * (It might be here stated that section 7 of the said act of April 10, 1861, had been repealed prior to the passage of the act known as 67 Ohio Laws, 10).

It is submitted that the law of Ohio never was such as is claimed by the appellees.

III.

ADDITIONAL OBJECTIONS OF APPELLEES CONSIDERED.

(1) The *Interurban Railway and Terminal Company* case, above referred to (see City's Appendix No. 2), also disposes of the objection (Appellees' brief, p. 4) that there is anything horrific in the ordinance of the city of 1914 attacked in the case at bar, because it provides as a condition of operating over the parts of the line where the old franchises have expired that appellees should surrender some of their rights under other franchises. In the *Interurban* case, over the same objection in effect as made at bar, the Ohio Supreme Court upheld a franchise condition requiring a through rate operating *outside* of the village and over tracks not owned or controlled by the grantee of the franchise.

Similarly it has been held in *People vs. Barnard*, 110 N. Y., 548:

"The common council required as a condition to its consent, that the purchaser of the franchise should carry passengers, for a single fare, to and from points *beyond the termination* of the proposed route over the road of the other and railways. *Held* that this was a condition the common council had a right to impose" (Syllabus, 5).

In *Col. Citizens Telephone Co. vs. Col.*, 88 Ohio St., the court said of a claim of "hold up" by the franchise terms imposed in earlier years:

"This would be a petty and futile plea of duress if it were set forth in the answer" (pp. 470, 471).

"The company was free to promise the annual payment *or refuse the grant*" (p. 471).

In *Columbus vs. Columbus Gas Co.*, 76 Ohio St., 309, we meet (as at bar) the old subterfuge of claiming, after the franchise had expired, that it was not necessary anyway, that it "was superfluous and unnecessary" (p. 312) and also that a city grant was not necessary at all (pp. 329, 330). The court said:

"Former ordinances * * * had run their course and have expired and the Gas Company wanted and needed the ordinance of 1892, and without it the company had no right against the will of the council to longer continue its business in the streets" (p. 331).

(2) The suggestion in appellees' brief, p. 21, that the Carthage grant was of no force because it was by resolution and not by ordinance is answered by Judge Sater who did not agree with this proposition. In his opinion he said:

"In so far as the grant of any franchise assumed the form of a resolution instead of an ordinance is

considered to be immaterial" (Record, p. 42, citing authorities).

See also authorities cited in the city's brief in chief, page 14.

Also it may be said that appellees' own citations show that a *mere irregularity* in the grant of a franchise after it has been enacted is usually considered immaterial.

3. The Telephone and Telegraph cases cited by appellees (Brief, pp. 11, 24, 33, 35, and 42) we submit are not applicable to street railway grants, and besides in each case they depend upon the statutes and constitutions in each State. We are concerned with the law of Ohio alone.

Note also that in those cases appellees cite there was no court recourse provision as in the case at bar.

See city's brief-in-chief, page 10 and following, also—

Seaboard Air Line Ry. Co. vs. City of Raleigh et al.,
219 Fed., 573:

"The enforcement of a municipal ordinance will **not** be enjoined if it is enforceable only by indictment for a violation thereof, as the validity of the ordinance may be tested by way of defense to the indictment" (Syllabus 2).

In *Louisville & Nashville R. R. Co. vs. Garrett et al.*, constituting the Railroad Commission of Kentucky, 231 U. S., 298, this court *declined* to enjoin the putting into effect of rates prescribed by the Commission. On page 311 this court said of the complaint that the carrier was denied the right to apply to this court; that if the rates were confiscatory a bill in equity would lie to enjoin the enforcement of the order (citing authorities). This court proceeds:

"Presumably the courts of the State, as well as the Federal courts would be open to the carrier for this purpose (*Home Telephone Co. vs. Los Angeles*, 211 U. S., 265, 278) without express statutory provision

to that effect. In answer to the present objection, it is sufficient to say that *there is no showing here of an attempt to preclude such resort to the courts*, or to deny to the carrier the assertion of its right unless it can be found in the severity of the penalties attached to the disobedience of the order, and if were assumed that these would be open to objection as operating to deprive the carrier of a fair opportunity to contest the ability of the Commissioners' action, still the penal provisions would be separable and the force of the remaining portion of the statute would not be impaired" (citing authorities).

4. *Milwaukee Electric Railway & Light Company vs. Railroad Commission of Wisconsin*, 238 U. S., 174:

"While it is the duty of this court to determine for itself whether there was a contract and the extent of a binding obligation, and the parties are not concluded by the decision of the State court, in so determining *this court gives much consideration to the decisions of the State court* construing the statutes of the State under which the contract is alleged to have been created" (Syllabus, 4).

Carlesi vs. New York, 233 U. S., 51:

"In testing the repugnancy of a State statute to the Federal Constitution, this court must accept the construction given to the statute by the State courts" (Syllabus).

Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531:

"If a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, the courts should adopt the latter, in view of the presumption that the lawmaking body intends to act within and not in excess of, its constitutional authority" (Syllabus 6).

"For in cases other than such as arise under the contract clause of the Constitution, it is the appropriate function of the court of last resort of a State to determine the meaning of the local statutes. And

in exercising the jurisdiction conferred by sec. 237 Judicial Code, it is proper for this court rather to wait until the State court has adopted a construction of the statute under attack than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution. *Bagtel vs. Wilson*, 204 U. S., 36, 40; *Adams vs. Russell*, 229 U. S., 353, 360" (p. 546).

(5) Appellees have pointed out an error that crept into the city's brief in chief (Appellees' Brief, p. 14.). This error does not in the least affect the argument of the city that the Louisville Trust Company case does not amount to an adjudication or to an estoppel against the city (see City's Brief in Chief, p. 25). And we repeat, that when the original case wherein the city complained of unlawful occupation of certain streets, was won in most of its claims, and the Cincinnati Inclined Plane Railroad Company left without a franchise to operate over certain of the "links" of its line, the city was not interested in the later foreclosure proceedings. Neither was the city compelled to attack "link" "C" (for example) when it attacked "links" "A" and "B." And, lastly, any right by estoppel over Erkenbrecher avenue expired in twenty-five years, a period long since ended.

There is also this further to be said, that now (what was not the case formerly) the city, by the ordinance of 1914 in question, expressly acted with reference to Erkenbrecher avenue, and so terminated any implied license to the appellees.

(6) Appellees (Brief, p. 6) complain of the rule of construction favorable to the public so often announced by this and other courts (City's Brief in Chief, p. 50), saying there is nothing to construe. But they are compelled to construe their own grants (See pp. 23, 24 Appellees' Brief, to take one instance alone).

(7) The case of *Lewis vs. Laylin*, 46 Ohio St., 663 Appellees' Brief, p. 28), simply holds that county commissioners have the power to improve certain roads at the county's expense, even though the improvement lies within a municipality, and that this is a power concurrent with the city's power (see p. 675). But—

"When accomplished, the streets thus improved (including the sidewalks and any bridges), would still remain *village streets*" (*Commissioners vs. State*, 50 O. S., 653, 658).

ON ANNEXATION the city became the authority in control of the streets:

Railroad Company vs. Defiance, 52 Ohio St., 262:

"The highways so brought within the corporate limits of the defendant, were *removed* from the control which the county commissioners theretofore had over them, and *became subject to the control*, supervision, and care of the *municipal authorities*, like other streets and highways of the corporation" (p. 299).

Affirmed by this court, 167 U. S., 88.

Steubenville vs. King, 23 Ohio St., 610:

"When territory, including a public road connecting with the streets of a city, is annexed to the city, and the road continues to be used as a street or thoroughfare, it thereby becomes a public highway of the city" (Ex. syllabus, 2).

See also—

Lawrence R. R. Co. vs. County Commissioners, 35 Ohio St., 1, 9.

State vs. Excill, 21 Ohio Circuit Ct., New Series, 60.

Township vs. Village of Macedonia, 22 Ohio Circuit Ct., New Series, 50.

IV.

CORRECTIONS.

We have above spoken of the error on page 27 of the city's brief in chief.

Cleveland Electric Co. vs. Cleveland is wrongly cited as 214 U. S. The correct reference is 204 U. S., 116.

Page 38 the word "track" in the seventh line from the bottom should read "tract."

In the Appendix of Statutes to the city's brief in chief, in the index, the words "section 2101" should read "section 2501," and on page 32 the reference "66 or 112" should read "65 or 112."

It is respectfully submitted that the decree below should be reversed.

CHARLES A. GROOM,

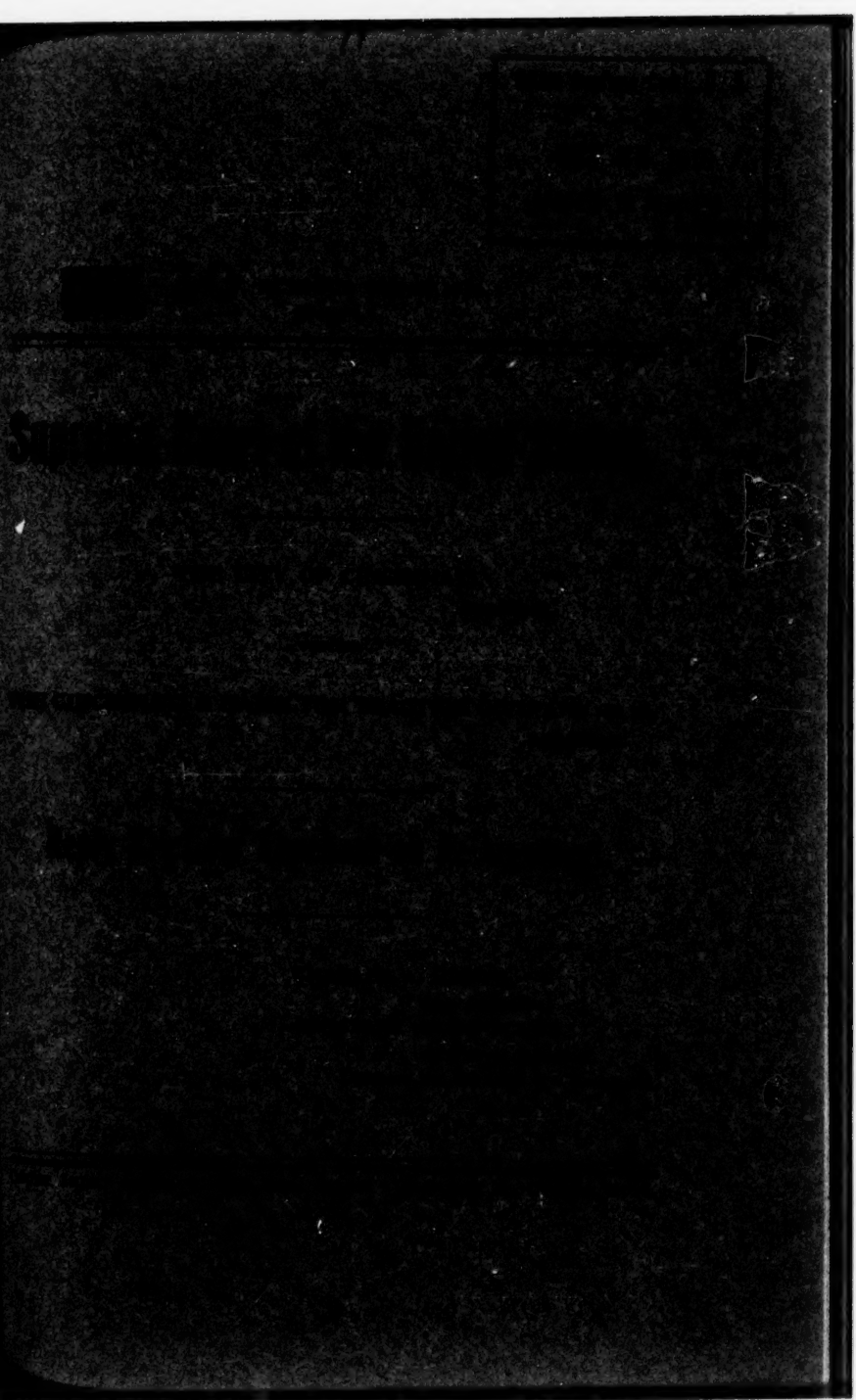
Solicitor of Cincinnati;

CONSTANT SOUTHWORTH,

Assistant Solicitor,

Counsel for the City of Cincinnati, Appellant.

January 22, 1916.



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Supreme Court of the United States.

No. 37, October Term, 1916.

(24344.)

THE CITY OF CINCINNATI,

Appellant,

vs.

*THE CINCINNATI & HAMILTON TRACTION CO.,
et al,*

Appellees.

Reply Brief for Appellant on Re-Argument.

This reply brief is a substitute for the reply brief in the white cover filed before the first argument of this cause.

I.

IT IS NOT THE LAW THAT THE CITY'S POWER TO REGULATE IS IN ABEYANCE UNTIL THE EXPIRATION OF APPELLEES' LONGEST FRANCHISE.

SUCH AN HOLDING WOULD GIVE APPELLEES A PERPETUAL FRANCHISE FOR THE ENTIRE LINE, WITHOUT CONSIDERATION.

The principal point made in the "Brief for Appellees on Re-argument" is that if there is any valid link in the

line of their railway, then the ordinance of April 21, 1914, impairs the obligation of the franchise therefor and is therefore void.

They would (indeed they must) stake their entire case on this remarkable proposition. The first point of the "Argument" in said brief is as follows:

"The ordinance impairs the obligation of contracts if the plaintiff has a valid, unexpired contract for any portion of the lines." (p. 6.)

And again:

"The question, therefore, is not whether there is one bad link, but whether there is one good link, because if there is a good link, the ordinance impairs its obligation." (p. 6.)

The fine spun or attenuated argument in support of this novel proposition, unsupported by any pertinent authority, extends from pages 5 to 11 inclusive. Again on page 76 of said brief, and as if confessing the weakness of their argument as to the alleged franchises on other portions of the line appellees again throw out their sheet anchor in the following passage:

"We submit we have shown that appellees have a good title" (we suppose they mean "franchise" although "title" is more correct) "to every part of the street railway line covered by this ordinance, *but we again urge* upon the court that *the question here is* not whether there is one bad link, but *whether there is one good link*, because if there is one good link the ordinance impairs the obligation of the grant or contract upon which it rests." (p. 76, Italics ours.)

Attention is asked particularly to this bold argument. It is evidently advanced to provide for the case of the expiration by lapse of time of the franchises for other portions of the defendant's line, if the City proves to be wrong in its contention here.

The logic of the appellees argument just mentioned would be that the City is powerless to regulate the lines until the expiration of the longest franchise for any link thereof, even though it made the other grants last longer than the 25-year limit imposed by Section 2502, Revised Statutes of Ohio (Appendix of Statutes, pp. 12, 13.)

The startling character of this conclusion is well illustrated by the fact that should appellees be successful in having this court construe any part of the grant south of Gas Hall as *perpetual*, the *rest* of their grants *would be automatically made perpetual* by a parity of reasoning.

We thus see the sinister suggestion contained in the use in the *decree* below of the apparently innocent words "at least until" before the 25-year dates specified as to each section of the line of appellees. These words were included in the decree on the application of counsel for appellees and against the protest of counsel for the City. This is undoubtedly part of a skilful plan to gradually *erect a perpetual right to operate the entire* Millcreek Valley line without the payment of any franchise tax to the City, other than that now reserved, to-wit: the pitiful sum of about \$320 per year. (R., 19, 21 and 25.)

The novelty of the contention of appellees is shown by the fact that the point apparently was not urged by the able counsel in the case of *The Detroit United Railways*

v. *Detroit*, 229 U. S., 39, or in the case of *The Louisville Trust Company v. Cincinnati*, 76 Fed., 296. This last case is significant because while the court remarked (*obiter*) that a small portion of the line was covered by a perpetual franchise, the court did not hold that this made perpetual the franchises for the rest of the line, or that the City had no power to assert the expiration of other grants for the other portions of the line. On the contrary the court said:

“The case would not be different if it located its tracks upon private property. If it owned the property in fee, its occupancy and use for corporate purposes might be commensurate with its corporate existence. *But, if it acquired a less interest than the fee, it might be ejected therefrom upon the expiration of its term.*

* * * It follows that this company held the right to maintain and operate its inclined plane railroad just so long as it had the right to occupy the place upon which its tracks were located. * * * As to so much of its railroad as occupied Locust Street * * * its right to maintain and operate its railroad over or upon public streets of the city depended upon the duration of its grant from the city.” (p. 309.)

After considering certain grants, Mr. Justice Lurton said:

“Both of these grants contained a limitation of 20 years, which has long since expired.” (p. 311.)

The court even distinguished between the two double tracks on the same street, holding that the right to one of them had expired. (See p. 316.)

We, therefore, urge the court in any disposition of this cause to notice this argument and deal with it for the best interests of the public by repudiating the same.

II.

THE ORDINANCE OF APRIL 21, 1914, EXPRESSLY SAVES FROM ITS OPERATION EXISTING FRANCHISES IF ANY THERE ARE.

At this point let us examine in detail the ordinance of April 21, 1914, which is the subject of this litigation. It is found on page 7 of the Record. While counsel for the City believe that the principles they invoke on behalf of the City show that there is no existing franchise for any part of the line, nevertheless counsel were compelled to recognize even before the ordinance was passed, that it was possible the court would differ with this conclusion of counsel in regard to at least parts of the line. There was no desire or intention to impair the obligation of any franchise, and consequently the ordinance was drawn in unmistakable language so as not to do this.

The preamble recites the operating companies and then recites that "on portions of the streets so occupied alleged grants have expired and on other portions" there have "never been any grants." The ordinance in its first section described the route of the appellees and provides that further operation thereover shall be only on the conditions of the ordinance, and Section 2 provides certain of these conditions.

Section 3 provides expressly for the situation that would result if over any link of the line there is a valid and unexpired franchise. In other words, in order to

avoid a construction or operation of the ordinance such as is now wrongly sought by opposing counsel, it is expressly provided in this section 3 that if it

“Should it be adjudged that *on only a portion* or portions of the said streets now occupied by the tracks of the Cincinnati and Hamilton Traction Company the right to operate street cars had never been granted, or if granted has ceased to exist, then this ordinance shall be construed to forbid the further operation of street cars on such portions except on the compliance” by the appellees “with all of the terms and conditions specified in this ordinance.”

There could be no plainer declaration of the intent of the City not to interfere with the existing grants and to declare that the ordinance only applies to the further operation over portions of the line where there were no franchises. And, in order to provide for an orderly determination of the questions as to whether the franchises had expired over any part of the line, the ordinance further provided for an adjudication by the use of the words “should it be adjudged,” and further in Section 5 the ordinance provided that the Solicitor should take legal proceedings to enforce the ordinance in case the appellees refused to comply therewith. These two provisions clearly indicate that the rights of the City must be and will be established only after an orderly procedure through the courts, and it was contemplated and directed that this should be through legal proceedings brought by the Solicitor.

Section 4 provided that if the companies should continue to operate it would be deemed an acceptance of the ordinance. Note the use of the words “to operate cars

on *said streets* shall be deemed an acceptance." This plainly refers to and should be read with the words in the next preceding section, namely, Section 3. "Should it be adjudged that on only a portion or portions of said streets" the right to operate has expired. The fair reading of Section 4 is that the operation of the cars over the portion of the line where it is adjudged appellees have no franchise shall be an acceptance of the ordinance. And even should this provision be held improper it would make no difference, for that provision or any other provision of the ordinance, if adjudged invalid shall, by the provisions of Section 7 of the Ordinance, "not affect the validity of the remainder of this ordinance."

Section 6 provides against a transfer by appellees to avoid the effect of the ordinance, and Section 8 makes the powers granted by the ordinance subject to repeal, amendment or revocation.

It would seem elementary that a franchise ordinance should be read as an entirety. No case is produced by opposing counsel holding the contrary. It is plainly not necessary to repeat in each of the sections of the ordinance all of the provisions of the remaining sections. In fact, brevity and clearness are both promoted by confining each section to a specific topic or topics and by applying the *general rule that where there is a specific provision it controls general language used elsewhere*.

The attempted analysis of the ordinance of April 21, 1914, by appellees is manifestly unfair. They begin by reciting substantially all of the ordinance, *omitting or excising the important section No. 3*, and then, exhibiting the mangled remains, declare triumphantly:

"* * * so that, assuming there is one good link in Hartwell, for instance, the ordi-

nance prevents" (sic) "the operation of cars over that link, except upon the terms of the ordinance." (Brief for appellees on Re-argument, p. 7.)

Appellees next turn with glee to the vital section 3, so excised as aforesaid, and patronizingly assert:

"This section does not itself ordain anything or substract anything from what is ordained elsewhere in the ordinance. It is not strictly a part of the ordinance * * *." (Brief, p. 8.)

Not "strictly a part of the ordinance"! Pray what is a part of the ordinance except what is contained therein? Is not every section embraced in the ordinance "strictly a part" thereof?

This and similar perversions with which the "brief for appellees on reargument" abounds throughout its ample length, some of the more conspicuous of which will be noticed below, renders applicable the language of Emerson: that appellees are guilty of few misstatements but are

"false in all particulars. Their every truth is not quite true. Their two is not the real two, their four is not the real four; so that every word they say chagrins us and we know not where to begin to set them right." (I Essays, p. 55.)

In like manner the provisions of Section 5 of the ordinance (R. 9) coupled with Section 3 provide for the enforcement of the ordinance, should it not be voluntarily accepted by the appellees, by the "City Solicitor" by "legal proceedings." No controversy with any patron of the line has been suggested, and the city in its answer expressly stated:

"The defendant denies that under the authority of said ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs, or either of them, of said electric street railway, or cause any damage or injury of any kind to the plaintiffs, or either of them, and defendant avers that *the enforcement of said ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction* first had and obtained, and after a hearing on due and reasonable notice to all interested parties." (R., 13.)

The ordinance could not go into the prejudicial effect appellees claimed. We will consider this matter further under the head of Jurisdiction. (P. 44 hereof.)

This court held in *Home Telephone Co. v. Los Angeles*, 211 U. S., 265, that "the rule that every presumption is in favor of the validity of legislation applies to a city ordinance." * * * (Pt. cl. 8 of Syl.)

The court said:

"Every presumption should be indulged in favor of the constitutionality of the legislation."
(p. 281.)

In *City of Cincinnati v. Cincinnati Inclined Plane Railroad Co.*, 30 Ohio Weekly Law Bulletin, 321; affirmed on the opinion of the court below, 52 Ohio St., 609, the court said:

"A legitimate mode of testing a disputed construction of a statute to determine whether it is the one which the legislature intended, is to look to the consequences which the construction in question will entail. If such consequences are absurd or unjust, a court will reject the in-

terpretation which necessitates them, unless restrained by the rigid and inflexible letter of the statute, for none of these can be presumed to have been within the legislative intent. (*Moore v. Given*, 39 Ohio St., 663.)" (p. 324.)

RULE OF STATUTORY CONSTRUCTION.

United States et al v. Jackson, 143 Fed., 783
(C. C. A., 9th Circuit):

"When one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto." (Syl. 2.)

"It is a well settled rule of construction that, where there is an irreconcilable conflict between different parts of the same act, the last in the order of arrangement will control." (Syl. 4.)

In *Doll v. Barr*, 58 O. S., 113, the Supreme Court of Ohio said:

"In *Endlich on the Interpretation of Statutes*, Section 216, the rule is stated to be, that: 'where there are in one act, specific provisions relating to a particular subject, they must govern in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone would be broad enough to include the subject to which the more particular relate.' " (p. 120.)

Plymouth Coal Co. v. Pennsylvania, 232 U. S., 531:

"If a statute be reasonably susceptible of two interpretations, one of which would render it un-

constitutional and the other valid, the courts should adopt the latter, in view of the presumption that the lawmaking body intends to act within and not in excess of, its constitutional authority." (Syllabus 6.)

"For in cases other than such as arise under the contract clause of the Constitution, it is the appropriate function of the court of last resort of a state to determine the meaning of the local statutes. And in exercising the jurisdiction conferred by Section 237, Judicial Code, it is proper for this court rather to wait until the state court has adopted a construction of the statute under attack than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution. *Bacgtel v. Wilson*, 204 U. S., 36, 40; *Adams v. Russell*, 229 U. S., 353, 360." (p. 546.)

Milwaukee Electric Railway & Light Company v. Railroad Commission of Wisconsin, 238 U. S., 174:

"While it is the duty of this court to determine for itself whether there was a contract and the extent of a binding obligation, and the parties are not concluded by the decision of the state court, in so determining *this court gives much consideration to the decisions of the state court* construing the statutes of the state under which the contract is alleged to have been created." (Syllabus 4.)

Carlesi v. New York, 233 U. S., 51:

"In testing the repugnancy of a state statute to the Federal Constitution, this court must accept the construction given to the statute by the state courts." (Syllabus.)

Accord:

Illinois v. William Henning Co., 260 Ill., 554.

That A PROVISION FOR A THROUGH FARE OVER THE LINES OF A DIFFERENT BUT CONNECTING STREET RAILWAY IS WITHIN THE POWER OF A CITY OR VILLAGE TO STIPULATE, has been very recently held by the Supreme Court of Ohio:

Interurban Ry. & Terminal Co. v. Cincinnati, 93 O. S., 108, where the through fare was operative over the tracks of the Cincinnati Street Railway Company and of the Cincinnati Traction Company.

And that such a provision is held valid elsewhere see

People v. Barnard, 110 N. Y., 548, holding that:

“The common council required as a condition to its consent, that the purchaser of the franchise should carry passengers, for a single fare, to and from points *beyond the termini* of the proposed route over the road of other street railways. *Held* that this was a condition the common council had a right to impose.” (Syllabus 5.)

See also Sections 3779 and 3778, General Code, Appendix of Statutes, p. 20.

III.

IT IS NOT AN IMPAIRMENT OF ANY CONTRACT TO REQUIRE AS THE PRICE OF A NEW GRANT THE WAIVING OF SOME EXISTING RIGHT.

There is no constitutional provision forbidding a city from requiring the grantee of a franchise to pay a consideration therefor. And thus there is no constitutional

prohibition forbidding the City of Cincinnati in making a new grant of a new franchise to operate a street railway over streets where former franchises had expired, to require a valuable consideration therefor. Such consideration might be in the form of a tax on *gross* receipts, which in the case of the Cincinnati Street Railway Company and the Cincinnati Traction Company, lessee (who are not in this case), amounts to 6% thereof; or it might be a day to day tax, which in the case of the Detroit United Railways Company was \$200 *per day* (229 U. S., 39); or it might be the surrender of some existing rights of the utility (see *Clement v. Cincinnati*, 16 Ohio Weekly Law Bulletin, 355, 356, affirmed 19 same, 74), or it might be some other consideration.

The reason that a consideration or a price is not a taking of property within the constitutional prohibitions is because it is voluntary.

The ordinance in question (April 21, 1914, Record, p. 7) makes the payment wholly voluntary by providing (Section 3) that if the Appellees desire to continue to operate over the streets whereon their franchise has expired, they must grant the 5 cent fare.

Hence, on principle there is in the ordinance attacked no provision repugnant to the Constitution, and this is also the express holding of this court: *Detroit United Rys. Co. v. Detroit*, 229 U. S., 39.

Judge, afterwards Mr. Justice Lurton, said in the Louisville Trust Company case (76 Fed., 296):

“The case would not be different if it had located its tracks on private property. * * * But if it acquired a less interest than the fee, it might be ejected therefrom upon the expiration of its term.” * * * (p. 309.)

See also Taft, Cir. J., in *Louisville Trust Company v. Cincinnati Inclined Plane Railway Company*, 78 Fed., 307, at 314 and 317.

In *Col. Citizens Telephone Co. v. Columbus*, 88 Ohio St., 466, the court said of a claim of "hold up":

"This would be a petty and futile plea of duress if it were set forth in the answer." (pp. 470, 471.)

"The company was free to promise the annual payment or refuse the grant." (p. 471.)

IV.

THE RULE OF CONSTRUCTION IN FAVOR OF THE PUBLIC.

This rule is well settled by the cases cited on page 50, and following, of the City's brief in chief, including

Central Transportation Co. v. Pullman Car Co.,
139 U. S., 24, 49.

East Ohio Gas Co. v. Akron, 81 Ohio St., 33, 52,
53.

Black v. Delaware Canal Co., 24 N. J. Eq., 455,
Syl. 7.

Cincinnati v. Cincinnati Street Ry. Co., 12 Ohio
Nisi Prius (New Series), 305, affirmed 92
Ohio St., 531.

Central Trust Co. v. Municipal Traction Co.,
169 Fed., 312 (passing on a Cleveland Street
railway ordinance).

We confine ourselves, therefore, to repeating, lest opposing counsel overlook the same, the following language by Mr. Justice Day in *Detroit United Railway v. Detroit*, 229 U. S., 39, quoting *Cleveland Electric Co. v. Cleveland*, 204 U. S., 116, 129, 130:

“ ‘The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature with a view of obtaining from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. *Blair v. Chicago*, 201 U. S., 400, 471.’ ” (p. 44.)

This rule is further illustrated by the well settled doctrine of this court that the power of a City or other agency of the State to deprive itself of the legislative function of fixing rates from time to time will never be implied and will only be conceded if there is express statutory authority for that purpose. Thus in *Milwaukee Electric Railway & Light Company v. Railroad Commission of Wisconsin*, 238 U. S., 174, this court, speaking by Justice Day, said, quoting earlier decisions of this court:

“ * * * It has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction.” (p. 180.)

In accord is:

Puget Sound Traction, etc., Co. v. Reynolds, 223
Fed., 371, 375.

It is obvious that this rule applies to grants where there are two permissible readings or interpretations. In such cases the rule is practically mandatory that the public be protected. This statement would seem a sufficient condemnation of appellees' elaborate attempt to pervert the meaning of the ordinance of April 21, 1914, criticized above. This ordinance is entitled to *at least* as fair an interpretation as is given to ordinary contracts.

ABOVE RULE APPLIED TO COUNTY GRANT.

But we mention this matter here especially because of the language in appellee's brief with reference to the earlier grants. To take a single instance, we call attention to appellee's discussion (pages 42 and 43) of the City's argument touching the County Commissioners' grant, found on page 32 of the city's brief in chief, where it is pointed out that the adjudication of the *quo warranto* case on appellees' own admission simply established the county grant "upon the terms therein set out." (Record 3.) We there called attention to the fact that the fourth and fifth conditions provided for action by the villages, the fifth condition in the county grant being that "the electric road" shall be "put in operation within twelve months from the time said company *shall have acquired the legal right to so construct.*"

" * * " This language obviously required the Cin-

cinnati Inclined Plane Railroad Company, appellees' predecessor in title, to apply to the Village of Carthage for a franchise. That this was anticipated as necessary is shown by the following application made to the Village of Carthage for a franchise found on page 218 of the Record:

“EXHIBIT ‘8.’

“CINNATI, January 28th, 1889.

“*To the Honorable the Board of Councilmen of the Village of Carthage, Ohio:*

“The Cincinnati Inclined Plane Railway Company has made application to the Board of County Commissioners of Hamilton County for permission to occupy with double or single tracks, with the necessary turn-outs and with the necessary appendages and appurtenances of an overhead electric street railroad system, the Carthage turnpike to its northern terminus at or near the county fair grounds at Carthage, so as to enable the said company to furnish continuous, rapid and safe transportation by electricity from the Fountain Square in Cincinnati to the Village of Carthage, and *now petition your honorable body for permission to occupy and operate its railroad through your village as above contemplated.*

“THE CIN. INC. PLANE RY. CO.,

“By H. M. LITTELL, *Pres’d’t.*

“Attest:

“J. M. DOHERTY, *Sect’y.*”

Thereafter the Village of Carthage on March 19, 1889, as requested, by resolution duly passed the grant to the Cincinnati Inclined Plane Railway Company. This grant is found in the Record on pages 16 and 275. It was amended on April 16th in a minor particular (R., p. 276)

and accepted on that day by the following document found in the Record on page 277:

“CINCINNATI, Ohio, April 16, 1889.

“*To the Council of the Village of Carthage,*

“Gentlemen: The Cincinnati Incline Plane Railway Company *hereby accepts the grant* made to it by your Hon. Body on the 20th day of March, 1889, and amended on the 16th day of April, 1889, giving it the right of way to occupy with double or single tracks, with the necessary turnouts, and with the necessary appendages and appurtenances of an overhead Electric street railroad system, the Carthage Turnpike, and either of the roads leading to the Carthage Fair Grounds, and *to operate* its said Electric road over and along the same, upon the terms and conditions therein stated.

“In Witness Whereof the said Cincinnati Incline Plane Railway Company has hereunto, caused its corporate name and seal to be affixed by J. M. Doherty, its Secretary, this 16th day of April, 1889.

“(Signed) CINCINNATI INCLINE PLANE
RY. Co.,

H. H. LITTLE, *Pres.*

“(Signed) J. M. DOHERTY, *Secretary.*

“Def’t ‘G.’ ”

To avoid the plain words of the grant appellees endeavor to create an ambiguity in their favor by saying (brief, p. 42) of the express saving in the county grant of rights to be otherwise acquired: “however, the language in question is easily explained. ‘The legal right to so construct’ *probably* referred to the corporate power of the company. * * * The resolution making the grant was *doubtless* drawn before such amend-

ment had been filed with the Secretary of State. *Or it may be* that the draftsman of the resolution had in mind "the date of acceptance.

Thus in order to escape the City's fair and reasonable construction of the language of the county resolution in Section 5 thereof, appellees are compelled to resort to probabilities and supposititious cases. They use in their very carefully prepared brief, the words "probably," "doubtless" and "or it may be." These are expressions of doubt to say nothing of the unfair suggestion that the "resolution making the grant was *doubtless* drawn before such amendment had been filed by the Secretary of State," of which there is not the slightest bit of evidence in the record and which is undoubtedly not the fact.

But clearly if there is any doubt but that the City's contention is correct, by the plain rule of construction before referred to, that doubt should be resolved in the interest of the public, and should not be resolved against the public and in favor of a perpetual grant to a private interest.

V.

THE DISMISSAL OF A *QUO WARRANTO* PROCEEDING IS NOT *RES ADJUDICATA* IN OHIO.

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY CASE, 93 Ohio St., 466.

In the city's brief in chief (p. 34 and following) we have shown that the law of Ohio is as above stated, citing several cases beginning with *Ohio ex rel v. The Cincinnati Gas Light & Coke Company*, 18 Ohio St., 262. The

Supreme Court of Ohio since the writing of said brief has again passed on this question, holding as claimed by the city. *State ex rel v. Northern Ohio Traction & Light Company*, decided October 19, 1915, 93 Ohio St., 466. A copy of the printed record in that case in the Supreme Court of Ohio was handed this court after the first argument. This case is now pending in this court on error as No. 313, October term, 1916, and the record has been printed, as we are informed, but we have no copy thereof. Consequently the references to the record in that case are to that in the Supreme Court of Ohio.

An examination of the record in *State, ex rel, v. Northern Ohio Traction & Light Company* will show that the Supreme Court of Ohio passed on two points directly involved in the case at bar. The cited case was a quo warranto proceeding instituted by the prosecuting attorney of Stark County, Ohio, against the Northern Ohio Traction & Light Company, "engaged in operating an interurban electric railroad in Stark county, in the state of Ohio, on a public highway known as the Canton-Massillon road, between the cities of Massillon and Canton" (Record, No. 14114, Supreme Court of Ohio, pp. 3, 4). In this cited case it appears from the averments of the pleadings and also from the evidence (see, for instance, p. 11 of said record) that the county commissioners' grant was made February 22, 1892, and that it was without limit in point of time. *Twenty-five years had not expired* when this proceeding was brought. The answer which appears in the record in the Ohio case, pages 14 and 15, contained the following averment:

- "First Defense. That on the 1st day of April, 1913, in an action in the Court of Appeals in and for Stark County, Ohio, wherein the

State of Ohio on the relation of the then prosecuting attorney for Stark county, Ohio, Charles Krichbaum, was plaintiff, and this defendant was defendant, *upon the same cause of action* alleged in the petition herein and involving the same subject-matter as this action said action in said court being number 928 upon the docket of said court, said Court of Appeals entered a final judgment on the merits thereof, dismissing said plaintiff's petition, and holding therein that the grant or franchise under the resolution of February 22d, 1892, of the County Commissioners of Stark County, set forth in the petition herein, is a perpetual grant to William A. Lynch, his successors and assigns, and that this defendant as the owner of said grant has a valid right to operate its electric railroad between the cities of Canton and Massillon, Ohio.

"All of the issues so decided in and by said judgment were directly raised and necessarily involved in said action. Said judgment has not since been reversed or modified, and is still a final judgment between the parties hereto upon the cause of action set forth in the petition herein. *Said judgment is a bar to this action* and by reason of the holdings of said judgment the plaintiff herein is estopped to deny that said grant by and under a resolution adopted by the Board of County Commissioners of Stark County on February 22d, 1892 (which resolution is set forth in the petition herein), is a perpetual and assignable grant, and that this defendant is the true and lawful owner of said grant."

The answer also claimed that the grant made by the County Commissioners of Stark County was a *perpetual* grant. But more of this below.

The record of the earlier case referred to in the above-quoted first defense of the Northern Ohio Traction & Light Company is found in the record in the Ohio case on page 49 and following. It discloses that the two cases were for the identical object, and that in the earlier case the State was unsuccessful.

The judgment of the Supreme Court of Ohio was announced October 19, 1915 (13 *Ohio Law Reporter*, 419), and a copy of the memorandum thereof appears below herein. The Supreme Court of Ohio found for the relator "upon the issues joined." The Supreme Court necessarily held the first defense bad, and that the earlier *quo warranto* proceeding was no bar. This is exactly the contention made by the city in the case now on hearing, excepting that the Northern Ohio Traction & Light case is much stronger and goes farther than the city need go in its claim. For in the Cincinnati case, between the time of the *quo warranto* case relied on by the appellees and the beginning of the controversy out of which this suit arises, there had occurred, among other important events, the following, to-wit, the expiration of the twenty-five-year period; on the other hand, in the Northern Ohio Traction & Light case there was no such difference between the two proceedings.

Besides this, we call attention to the fact that the judgment in the earlier *quo warranto* case in the matter of the Northern Ohio Traction & Light Company was one of dismissal (page 75 of the record in the Northern Ohio Traction & Light Company case). Likewise, in the *quo warranto* case relied upon by appellees in the instant case, the judgment was one of *dismissal* (see judgment entry, pages 178 and 179 of the record in this court in the case at bar).

A *quo warranto* case is pleaded as an adjudication in the case at bar of the line south of Gas Hall. It is so referred to in appellees first brief in this court. Since the decision of the Northern Ohio Traction & Light Company case, 93 Ohio St., 466, the tone of the argument as modified in the "Brief for Appellees on Re-argument" lacks its former confidence. While the matter was not mentioned in the Ohio court's memorandum opinion, appellees do not deny that the Ohio Supreme Court necessarily held that one *quo warranto* case is not a bar to a later case; in fact they apparently admit this contention (brief, p. 51). Even the dissenting opinion cites with approval the case of *Ohio, ex rel, v. The Cincinnati Gas Light & Coke Co.*, 18 O. S., 262, see 93 O. S., 469.

But appellees object that a *quo warranto* proceeding concludes proprietary rights of the City, although they can find no scintilla of authority for that proposition.

In *Society Perun v. Cleveland*, 43 O. S., 481, it was held (contrary to appellees contention):

"The judgment of ouster" (in an earlier *quo warranto* case) "was an adjudication between the state and the society upon the right of the latter to exercise corporate franchises. For the purposes of such adjudication it was competent for this court to consider and determine what had been its status from its first attempt to incorporate. *But it had no power to pass upon or determine the rights of parties not before it,*" (p. 489) such parties being those interested in and dealing with the corporation."

If such is the rule as to a judgment of ouster, how much more is it the rule that the proprietary rights of a third party like the City of Cincinnati is not affected by a judgment dismissing a *quo warranto* proceeding!

And in Ohio, unlike some jurisdictions, cities are not subject to unlimited legislative control. For instance, its right to contract can not be constitutionally limited:

Cleveland v. Clements Bros. Construction Co.,
67 O. S., 197, 210, 211.
State v. Brookman, 70 O. S., 428.

We conclude in the language of the court in *State, ex rel, v. Railroad Co.*, 50 O. S., 239:

Quo warranto "is not then a suit for the vindication of the proprietary rights of the individual as against the claims of the corporation.
* * *" (p. 252.)

VI.

STREET RAILWAY FRANCHISES WITHOUT LIMIT IN TIME ARE DETERMINABLE AT THE WILL OF THE GRANTOR.

The above-cited *Northern Ohio Traction & Light Company case*, 93 O. S., 466, is, however, a still more important authority for the city because of the square holding, as above stated, against perpetual grants. In the earlier *quo warranto* case the contrary result had been reached (15 Ohio Circuit Court [New Series], 577). It was there held that such a franchise was perpetual.

The Supreme Court of Ohio, however, followed the case of the *Gas Company v. City of Akron* (81 Ohio St., 33), which holds that such a franchise is determinable at will. This Gas Company case is cited several times by the city in its brief in chief (pages 8, 49, and 51). See more especially the extract quoted on page 49 of the city's brief in chief and also the syllabus in the gas case.

We further call attention to the following language of the Supreme Court of Ohio in the case of *Gas Company v. Akron*, 81 Ohio St., 33, on the authority of which the Northern Ohio Traction & Light Company case was decided:

“It is true that the ordinance grants the rights to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the Gas Company has a perpetual franchise in the streets? We are not now prepared to hold that the company has acquired such a perpetual franchise. * * *”.
(p. 52.)

And again:

“It comes then to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and, to preserve the mutuality in the contract, the franchise can continue only so long as *both* parties are consenting thereto.” (p. 53.)

And here we may note that the dissenting judges in the Northern Ohio Traction & Light Company case (93 Ohio St., 466) give the misleading impression that the Ohio Gas Statutes gave the City the right to regulate the Company from time to time. As a matter of fact, the Ohio Gas Statutes provide for two distinct things. One is the right given the City to grant a gas company the right to lay mains in its streets, and the other is the right to make ten-year contracts as to the price of gas.

Frequently, in Ohio, the same ordinance provides in one section for the franchise to lay the gas mains in the streets and in other sections provides for the ten-year contract as to price, this ten-year contract as to price

having no connection with the length of the franchise to occupy the streets. This was the case in *Gas Co. v. Akron*, 81 Ohio St., 33. This was also the case in *Columbus v. Columbus Gas Co.*, 76 Ohio St., 309, where the Ohio Statutes as to gas franchises are fully discussed.

The majority in the *Northern Ohio Traction & Light Co. case, supra*, were therefore right in finding that there was no difference with reference to a grant without limit in time to a gas company from a similar grant to a street railway company.

THE FOREGOING, HOWEVER, IS NOT THE MOST IMPORTANT ASPECT OF THIS NORTHERN OHIO TRACTION & LIGHT COMPANY DECISION. The case in the lower court, which never was the law of Ohio, was, unfortunately for the city, cited and relied on by the trial judge in the case at bar (see references to erroneous decision in 15 Circuit Court [New Series], 577, in Judge Sater's opinion, record, pages 30 and 31). Judge Sater regarded this case as of peculiar significance because it construed the same sections of the statute as are involved in the case at bar and Judge Sater pointed out that the franchises involved in the two cases were granted within three years of each other, to-wit: 1889 in the case at bar, and 1892 in the Northern Ohio Traction & Light Company case (see the discussion of the question by the trial court on page 31 of the record in the case at bar). Judge Sater refers to this Northern Ohio Traction & Light Company case three times in his opinion, the first reference being in the third paragraph thereof. He was undoubtedly misled by this case and believed he was following the Ohio decisions when as a matter of fact he was not. This initial error permeates the entire opinion. It is carried into the decree, wherein certain of the franchises claimed by appellees are ad-

judged to be perpetual, notwithstanding the grant under which they are claiming *did not contain words of perpetuity*. This County Commissioners' grant (see Record, page 14) on which the appellees lean so heavily was *not* even in terms made to the grantee, its successors and assigns.

And yet the trial court not only granted the relief prayed by the appellees in their bill filed below, but proceeded to adjudge to them perpetual rights in certain streets!

The following is a certified copy of the judgment in the Supreme Court of Ohio in the cited case:

"Supreme Court of State of Ohio of the Term of January, A. D. 1915, to-wit: Tuesday, October 19th.

"State of Ohio, City of Columbus, ss:

"No. 14114. The State of Ohio, ex *rel* Hubert C. Pontius, Prosecuting Attorney of Stark County, vs The Northern Ohio Traction & Light Company. In Quo Warranto.

"This cause came on to be heard on the pleadings and the stipulation of the parties and was argued by counsel. On consideration whereof, the court finds upon the issues joined in favor of the plaintiff on the authority of *Gas Company v. The City of Akron*, 81 Ohio St., 33.

"It is, therefore, ordered and adjudged that the said defendant be ousted from the exercise and use of the rights, privileges and franchises described in the petition of the plaintiff in the operation of the interurban electric railroad therein described, and it is hereby ordered to remove its tracks and switches from the said Canton and Massillon road between the corporate limits of the said cities of Canton and Massillon within ninety days from this date.

"It is further ordered and adjudged that the plaintiff recover of the defendant its costs herein taxed to \$—.

* * * * *

"I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said court, to-wit: from Journal No. 27, page 182.

"In witness whereof, I have hereunto subscribed my hand and affixed the seal of said Supreme Court, this 10th day of November, A. D. 1915.

"Duly stamped and sealed.

"FRANK E. MCKEAN,
"Clerk Supreme Court of Ohio."

In deciding as above the Supreme Court of Ohio only followed the strong intimation made by that court many years ago to the same effect. Thus in the case of *State, ex rel, v. The Columbus Railway Company* (1 Ohio Circuit Court [New Series], 145, decided in 1903), the lower court having held that a street railway grant prior to May 14, 1878, was perpetual unless its term was expressly limited, the Supreme Court of Ohio, in 73 Ohio St., 363, while affirming the lower court, expressly did *not* approve of the doctrine announced by the lower court as to the perpetuity of the franchise. The Supreme Court said that the judgment was "affirmed on the sole ground that defendant had *present right* to occupy the streets at the time of the commencement of this action. The other questions presented *are not decided*" (73 Ohio St., 363).

Ohio is thus in accord with the modern tendency of decision:

Pond, "Public Utilities," Secs. 168, 169, 182.

NO PERPETUAL FRANCHISES IN OHIO.

The cases above cited clearly show that there are no perpetual street railway franchises in Ohio. An attempt is made on pages 55 and 56 of the brief for appellees to lead the court to believe that it had once been the rule of decision in Ohio courts that street railway grants might be perpetual. The case cited for his proposition is *Junction Railroad Company v. Ruggles*, 7 Ohio St., 1. This was the case of the grant of an easement to a steam railroad. There is a manifest difference between such railroads operated across country and street railroads. In Ohio there is an entirely separate set of statutes pertaining to such railroads. See Section 8744, General Code of Ohio (R. S. Section 3311), and following. Without going further into the differences between steam and interurban or street railroads, we call attention to the case of *Electric Railway Company v. Ottawa*, 85 Ohio State, 229, *Cincinnati Incl. Pl. R. R. Co. v. Cincinnati*, 7 Ohio Nisi Prius, 541, and *L. & P. R. R. v. Louisville City Railway*, 63 Ky., 175, where the question is fully discussed.

The remarks made in *Louisville Trust Company v. Cincinnati*, 76 Federal, 296, certainly do not rise to an adjudication of this important question. The grant there considered was the ordinance of December, 1871, and twenty-five years had not expired even at the time of the decision of the Court of Appeals, much less when the suit was originally started in the Federal Courts. The court admits that "only a fragment of the grant has ever been actually used—that part of the line at the base of the inclined plane south upon Main to Liberty." (Page 315.) This was only one block out of a line several miles long, see plat R., 169.

Besides this, in the case at bar the City *has* acted by the ordinance of April 21st, 1914, and so is squarely within the rule laid down in 93 Ohio St., 466.

We note from page 311 of the Louisville Trust Company case that the attack on this franchise had been confined to the claim which the state courts had approved, that the "city had no power to extend the tracks of an inclined plane company organized as a steam railway along the streets of a city to be operated as a street railroad."

We may fairly conclude that the question of perpetuity was not pressed on the court and the remarks in regard thereto were substantially obiter.

The telephone and telegraph cases cited by appellees are in a class by themselves. As said by this court, speaking by Mr. Justice McReynolds, 239 U. S., 313, at 321:

"A municipal corporation under *exceptional circumstances* may be held to have waived its rights or to have estopped itself."

Besides this the said cases depend upon the peculiar statutes of each state, and none of them purport to declare the law of Ohio.

THE TERM OF COUNTY COMMISSIONERS' GRANTS CAN NOT EXCEED TWENTY-FIVE YEARS.

Appellees rely on Sections 3438 to 3441, R. S. O. (brief, pages 27 and 69). These sections should be read together.

Citizens Electric R. Co. v. County Commissioners, 56 Ohio St., 1, 7. 8.

State, ex rel, v. Northern Ohio Traction & Light Co., 93 Ohio St., 466, 476.

The City has heretofore submitted this point (see City's brief in chief, pp. 21, 22).

Original Section 3439, Rev. Statutes of 1880 (Appendix of Statutes, p. 3), expressly made county grants subject to the twenty-five year limitation in Section 2502, Revised Statutes. (Appendix of Statutes, p. 1.) The Act of April 18, 1883, 80 Ohio Laws, 173 (Appendix of Statutes, pp. 4-7), took the reference to Section 2502 out of Section 3439 and added it to Section 3438.

This amendment was either constitutional or unconstitutional. If unconstitutional (see argument City's brief in chief, p. 48) then Section 3439 remains unchanged as held in *Ry. Co. v. Ry. Co.*, 5 Ohio Circuit Court (New Series), 583, 73 Ohio St., 364. (Appendix of Statutes, p. 28 *et seq.*)

If the act was constitutional the county grant was expressly as well as impliedly, subject to the twenty-five year limitation in Section 2502, Revised Statutes, by virtue of the last part of Section 3438, R. S. O., at least when within the city limits or brought within by annexation.

A reference to the historical note appended at the end of Sections 3437, 3438, 3441 and 3443, Revised Statutes of Ohio, as given in all the editions of the statutes and as copied in the City's Appendix of Statutes, shows that their common origin is the act of February 19, 1870, 67 Ohio Law, 10 (Appendix of Statutes, p. 7).

This act provided for the extension of street or horse railroads within or without, or partially within or without, municipalities, saying, however, that these grants should be "in accordance with the provision of the act entitled 'An act to provide for and regulate street railway companies,' passed April 10, 1861." This act of April 10, 1861, is copied on page 8 and following of the city's Appendix of Statutes, which provided originally

in Section 5 "that hereafter no street railroad shall be constructed or commenced *until the consent of the city council or corporate authorities of the city, town, or village* wherein said road is to be constructed shall be first obtained." * * * This section was amended in 63 Ohio Law, 55 (March 27, 1866) but its effect was not changed. See history of the Legislature City's Appendix of Statutes, pp. 30, 31.

It is submitted that the law of Ohio never was such as is claimed by the appellees.

EFFECT OF ANNEXATION: COUNTY ROADS BECOME CITY STREETS.

In *Springfield & Washington Railway Co. v. City of Springfield*, 15 Ohio Nisi Prius (New Series), 241; affirmed by the Court of Appeals on the opinion of the trial judge (p. 241, note) the court held that the control of the county franchise along the Clifton Pike (p. 243) so far as brought within the City by annexation was in the City, the court saying:

"The court is of the opinion that the controversy between the parties in this case should be determined as if it were a case in which the city of Springfield had given the franchise to the plaintiff in terms the same as that which it obtained from the board of county commissioners of Clark county and afterwards sought by the franchise pleaded in the answer of the city to virtually abrogate said first franchise and subject the plaintiff to such second franchise without its consent." (p. 251.)

And this is the general rule in the absence of express statutory provision to the contrary,

Mayor of Baltimore v. United Railways & Electric Co. of Baltimore, 107 Md., 250; 14 L. R. A. (N. S.), 805.

And generally county roads taken into a city by annexation become city roads.

In *Railroad Co. v. Defiance*, 10 C. C., 27, the court said:

"A claim is made that the Holgate Pike (now Clinton street) and the Brunersburg Road (now Ralston avenue) are county and state roads, under the control of the Board of County Commissioners. This position is not tenable. The Supreme Court have held in *Steubenville v. King*, 23 Ohio St., 610:

" 'Where territory, including a public road, connecting with the streets of a city, is annexed to the city, and the road continues to be used as a street or thoroughfare, it hereby becomes a public highway of the city within the meaning of this section (Section 2640), although it has never been "accepted for such purpose," as provided in Section 2650.' " (p. 32.)

Railroad Co. v. Defiance, 52 O. S., 262; affirmed in 167 U. S., 88. In disposing of the contention that the county and not the city had control of the highway, the court said:

"Highways so brought within the corporate limits of the defendant, were *removed* from the control which the county commissioners theretofore had over them, and became subject to the control, supervision and care of the municipal authorities, like other streets and highways of the corporation.

"By express statutory provision, the council is given 'the care, supervision and control of all

public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation,' and is charged with the duty of causing 'the same to be kept open and in repair, and free from nuisance,' Section 2640, Revised Statutes. *The duty thus devolved upon the council is attended with the power to do whatever may be necessary in the proper and lawful performance of the duty, including the power to improve such ways, or parts thereof, in any lawful manner, when, and as, the public convenience may demand.*" pp. 299, 300.)

In *Commissioners v. State, ex rel*, 50 Ohio St., 653, the court in holding unconstitutional as a special act one authorizing the *Commissioners of Hamilton County* to improve Montgomery Pike, said:

"It is not stated in so many words, but the fact, we think, sufficiently appears by the record, that the turnpike thus to be improved runs through the villages of Norwood and *Pleasant Ridge*, and the effect of the act, therefore, is, among other things, to improve village streets, and to do this in an unusual way. When accomplished, the streets thus improved (including the sidewalks and any bridges), would *still remain village streets*, as to which, by Sections 1692 and 2640, Revised Statutes, the council have the care, supervision and control, and would be required to keep open, in repair, and free from nuisance." (pp. 658-659.)

VII.

THE OHIO STATUTES REQUIRE THE CITY OR VILLAGE TO CONSENT TO THE OPERATION OF A STREET RAILWAY LINE WITHIN ITS LIMITS.

Appellees claim that the Ohio statutes authorized the County Commissioners of Hamilton County to grant a perpetual franchise on a county road, even within the limits of cities and villages. Such a rule would result in disastrous confusion and conflict between municipal and county grants, and would place street railroad companies in a delightful twilight zone, between county and municipal control, wherein any obnoxious franchise limitation could be litigated, among other reasons, in order to decide just what are and what are not county roads.

Fortunately for the city of Cincinnati, *and since the judgment below*, the Supreme Court of Ohio has passed on this question. In the case of the *Interurban Railway & Terminal Company v. The City of Cincinnati*, 93 Ohio St., 108, printed as Appendix No. 2, the court had before it the question as to the power of a village to impose on a strictly interurban company a condition providing the rates of fare to the Cincinnati terminals on annexation. The Supreme Court of Ohio quotes and follows *Railroad Company v. Commissioners* (56 Ohio St., 1), the extract therefrom in the opinion showing that the city is correct in its reliance on said case as set out on pages 17 and 18 of the city's brief in chief to the effect that county grants are not a substitute for a city or village grant. The Supreme Court of Ohio in the *Interurban* case proceeded to say:

"By the first section of the interurban act of 1894, above referred to, the corporate power is conferred upon companies to construct electric street railroads upon highways outside of municipalities, *but the right to extend within or without the municipality must still be secured from the municipality itself.*" (p. 121; Appendix 2, p. 11.)

And as a matter of fact the grants considered in the *Interurban case, supra*, were along the Montgomery turnpike, which was a county road and also a through highway of great importance (see the decision in *Commissioners v. State*, 50 Ohio St., 653).

Again in the same volume of the Ohio reports in which the *Interurban case, supra*, appears, in the dissenting opinion in the Northern Ohio Traction & Light Company case, 93 Ohio St., 466, there is given the following statement as the admitted law of Ohio as to the power of counties, limiting expressly county grants to territory *outside* of municipalities:

"* * * but in the present case the Legislature has granted to the board of county commissioners the naked authority of permitting county commissioners, *outside of municipalities*, to grant an easement in the public highways, and to fix terms and conditions of construction. Sections 3438-3443, Revised Statutes." (93 Ohio St., 476.)

Note that the county grant considered in the cited case was made February 22, 1892 (p. 170), under the same statutes as those relied on in the case at bar, to-wit, Sections 3438-3443, Revised Statutes.

We submit it takes more than common assurance, in the face of these decisions to quote these sections as ap-

pellees do on page 27 of their brief as authority for the commissioners grant and as giving them a franchise "on every part of this section of the line whether within or without any municipal corporation."

Appellees rely argumentatively (p. 28 *et seq.*) on some road improvement cases, the more important of them, *Lewis v. Laylin*, 46 Ohio St., 663, expressly saving the authority of the city, e. g., p. 674, 675. But on the contrary we cite street railway decisions which are directly in point. Even the zeal of the appellees, and it is undoubted, has failed to disclose a single reported case in Ohio even colorably bestowing on county commissioners the power that they claim and which is so essential to their case.

In fact the Ohio decisions are all the other way. Besides the two cases in 93 Ohio State, *supra*, on this point we have reviewed the earlier cases and the statutes succinctly in the City's brief in chief, pages 14 to 23, citing and quoting the following cases, showing that in every instance the courts have required a municipal grant no matter how the question has arisen:

County Commissioners v. Citizens Ry. Co., 9 Ohio Circuit Court, 183, 190.

Citizens Electric Rd. Co. v. County Commissioners, 56 Ohio St. 1, at page 8 and 9, quoted in the City's brief in chief on page 17.

C., C., C. & St. L. Ry. Co. v. Urbana, B. & N. Co., 5 Ohio Circuit Court (New Series), 583, 597, Syl. 5; affirmed 73 Ohio St., 364, quoted in the City's brief in chief on page 18.

C., L. & A. St. R. R. Co. v. North Bend, 70 Ohio St., 46, 48, quoted in the City's brief in chief on page 18.

Board of County Commissioners of Cuyahoga County v. A. B. & C. Co., 21 Ohio Circuit Court, 769, quoted in the City's brief in chief on page 18.

In Re Annexation of Township of Newburgh, 15 Ohio Circuit Court, 78, 81, quoted in the City's brief in chief, page 19.

State, ex rel, v. Cincinnati & Hamilton Electric Ry. Co., 19 Ohio Circuit Court, 79, 90, 89, quoted in the City's brief in chief, page 20.

Cincinnati Inclined Plane Ry. Co. v. Cincinnati, 7 Ohio Nisi Prius, 541, 542, quoted in the City's brief in chief, page 21.

Louisville Trust Co. v. Cincinnati, 76 Fed., 296, 308, quoted in the City's brief in chief, page 22.

Cincinnati v. Cincinnati Inclined Plane Ry. Co., 30 Ohio Weekly Law Bulletin, 321, 325, col. 1; affirmed 52 Ohio St., 609 on the opinion below, quoted in the City's brief in chief, page 22.

Hattersley v. Village of Waterville, 4 Ohio Circuit Court (New Series), 242, at 247; affirmed 74 Ohio St., 466.

See also the citations on page 23 of the City's brief in chief.

Further, we call attention to the fact that even the trial judge in the case at bar did not expressly state anywhere in his opinion that he agreed with the contention of opposing counsel as to the power of the county commissioners to the exclusion of the municipal authorities. See the opinion of the trial court, Record, page 29 and following.

We conclude on this branch of the case that this assertion of power in the county commissioners is wholly without warrant in law.

VIII.

NO FRANCHISE OVER ERKENBRECHER AVENUE, AND NO ESTOPPEL.

The argument of appellees as to this part of the line is founded on the grant from the Zoological Land Syndicate, an estoppel as to the 241 feet at the Zoo entrance, and the sale under the decree of mortgage foreclosure in the second Louisville Trust Company case, that brought against the Cincinnati Inclined Plane Railway Co. with which the suit against the city was afterwards consolidated. (Brief, pp. 18, 20 *et seq.*) Out of these materials and the quo warranto case, noticed above, and the Millcreek Valley case, noticed below, appellees would erect a perpetual right, although, be it observed, the trial court only vouchsafed them a "present right" over the 241 feet. (R. 45.)

Appellees' argument reads well, but on examination it will be found to rest wholly upon a confusion of two distinct rights, namely, the right to the track in the street, and the franchise to operate street cars and collect fares thereover. Now the former right may be granted by some private person who is at the time the owner of the land crossed by the tracks, but it is unheard of that any private person could grant a franchise to operate street cars and to collect fares over a street which grant would survive the dedication of the street. No Ohio statute giving a private person the right to grant such a franchise has or can be cited.

On the other hand, the property right in the tracks is one which this court will protect even though the franchise to operate cars and collect fares thereon has expired.

In *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S., 116, this court said:

“The defendants insist that, upon the termination of the grant to the Garden street branch, the rails, poles and other appliances for operating that road, and then remaining on the various streets, became the property of the city or at least that the city had the right to take possession of the streets and of the rails, tracks, etc., therein existing. We agree with the court below in the opinion that the title to the property remains in the railroad company which had been operating the road. * * *” (p. 142.)

The failure of appellees to discriminate between these two distinct classes of rights is a vice that permeates their entire argument.

Contrary to the implication in appellees' brief, the city made no attack in the Louisville Trust Company case on the franchise of the Cincinnati Inclined Plane Railway Company north of the Zoo, although the Zoo was then in the city limits (an accidental error in the brief in chief, page 27, to the contrary notwithstanding), nor did the city claim any right to the tracks.

The purpose of the Louisville Trust Company case against the city was to prevent, in the interest of the mortgagees, the city from enforcing the decree in the state courts holding that certain franchises of the Cincinnati Inclined Plane Railway Company had expired, and from compelling the railway to remove its tracks as a trespasser. (See statement of facts by Justice Lurton, 76 Fed., 298.) While the city did not secure so broad a decree in Federal court as it had in the state court,

still it had broken the continuity of the railway's line, the city was victorious, and after an ineffectual attempt by the Louisville Trust Company to have this court review Justice Lurton's decision, 164 U. S., 707, the company gave up and was subsequently liquidated. Now when the Court of Appeals came to consider the kind of a decree it would enter, modifying the decree of the state court, it will be observed that it was dangerously near enjoining the state court, see p. 317. And we should recall that the United States Circuit Court had refused to entertain the bill at all, 73 Fed., 716. Judge Lurton, however, thought that the City should be enjoined from taking up the tracks on those sections he had considered to be under valid and subsisting grants. The grant of October 27, 1875, which extended out to the Zoo from the top of the incline, was attacked by the City as one the company could not hold, but, being for thirty years, had not expired at the time of the suit. (p. 311.) The victory of the City was conceded by Judge Lurton, who said the Federal Court "should be quick in directing its receiver * * * to desist from the operation of such parts of the road as are upon streets where the easement has expired." (p. 318.) But as the property of the railway was by that time in the hands of the Federal receiver in the foreclosure case, Judge Lurton applied the well known doctrine that the Federal Court having once taken jurisdiction, will see the matter through and will allow no other court to control its officer. The court accordingly sent the case back to the Circuit Court with directions to bring the City into the receivership case.

A reading of Judge Lurton's opinion makes it apparent that the City had never once thought of the line north

of the Zoo entrance. It claimed no property right in the tracks and poles of the defeated company, and doubtless was glad to see them sold to a representative of the Cincinnati Street Railway interests. The "rights in the mortgaged property" referred to in the quotation on p. 24 of Appellee's brief, are the City's claims as a judgment creditor for unpaid license fees. (*Cincinnati v. Cincinnati Incl. Pl. Ry.*, 56 Ohio St., 675, 692.)

No adjudication of any right in the company and against the city appears either in the opinion or in the decree in the foreclosure case. And in the case at bar no adjudication as between the city and the predecessor in title of appellees has been pleaded or proved as founded on this Louisville Trust Company case. The only order made in the Louisville Trust Company case touching the section of the line now in question was a mere order of sale.

Besides the foregoing it is plain that the mere sale of any inchoate right to operate over Erkenbrecker avenue would not enlarge any estoppel to a perpetual franchise. Even a franchise by estoppel, if there be such a thing, must have some limit. As appellees concede that the line was in operation in 1889 (Brief, p. 20), the twenty-five year limit was reached over two years ago.

The trial judge in his opinion made a curious suggestion as to the short section of line shown on the inset map on the plat (Exhibit A), of which a copy is attached to the brief in chief for the city, namely, that

"the right of the plaintiffs to operate their cars over said 241 feet exists, and, in my judgment, will continue so long at least as any indebtedness incurred in good faith on the strength to so operate is outstanding, my under-

standing from counsel being that the plaintiffs have bonded their roads, including the 241 feet in question" (Record, page 40).

The court intimated that a grant by estoppel might thus exceed the twenty-five year limit for which an express grant in Ohio might run, and that such grant by estoppel might last as long as a bond issue might run. This seems a most remarkable doctrine, for, as shown in the city's brief in chief on page 39 and following, estoppel can not confer an unknown power upon a municipality, either in Ohio or elsewhere.

We adopt the forcible language of the same counsel who represented the Millcreek Valley Street Railroad Company in the later litigation (but used earlier):

"As regards the bondholders' expenditures, there are two answers: (1) Both this court and the federal court refused to recognize these expenditures as a reason for alleged implied renewal (30 W. L. B., 327, affirmed, 52 Ohio St., 609; 76 Fed., 316); and (2) the court would itself have to create a right or easement in the streets in favor of the bondholders—which, of course, would be a legal absurdity." (*Cincinnati v. The Cincinnati Inclined Plane Railway Co.*, 56 Ohio St., 675, 689.)

See in addition to the Ohio and Federal cases cited on this point at said page 39:

Cincinnati v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway, 24 Ohio Circuit Court (New Series), 305 (Court of Appeals Hamilton County, decided December, 1915), holding that there was no estoppel, even in the face of an express but *ultra vires* grant.

We also mention the case of the Northern Ohio Traction & Light Company, *supra*, in this connection because on page 45 and especially page 91 and following, including p. 95 of the record, there were shown to have also been present mortgages on the traction line there attacked. Of course, the answer to the suggestion is that one contracting with a municipal corporation is bound to know the limits of its power (see the Ohio and other cases cited, pages 40 and 42 and following, in the city's brief in chief; see also a square holding to this effect in *Village of Carthage v. Dieckmeier*, 79 Ohio St., 323).

As well said by Mr. Justice Holmes:

"By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject not paramount to proviso for repeal." (*Calder v. Michigan*, 218 U. S., 591, 599).

As well said by Mr. Justice Day:

"The" (street) "railway took the several grants with knowledge of their duration." (229 U. S., 39, at 45.)

For further authorities in Ohio and in the Federal courts holding that there can be no franchise by estoppel, and that no estoppel can confer on a city an unknown power, see the brief in chief, p. 40 and following.

IX.

JURISDICTION.

ADDITIONAL POINTS.

In addition to the authorities cited in the brief in chief on the question of the jurisdiction of the Federal Court

where the city ordinance provides for its own enforcement through the courts, see brief in chief, pages 9 to 13, we cite the following:

Seaboard Air Line Ry. Co. v. City of Raleigh et al, 219 Fed., 573:

“The enforcement of a municipal ordinance will not be enjoined if it is enforceable only by indictment for a violation thereof, as the validity of the ordinance may be tested by way of defense to the indictment.” (Syllabus 2.)

In *Louisville & Nashville R. R. Co. v. Garrett et al*, constituting the *Railroad Commission of Kentucky*, 231 U. S., 298, this court *declined* to enjoin the putting into effect of rates prescribed by the Commission. On page 311 this court said of the complaint that the carrier was denied the right to apply to this court; that if the rates were confiscatory a bill in equity would lie to enjoin the enforcement of the order (citing authorities). This court proceeds:

“Presumably the courts of the State, as well as the Federal courts would be open to the carrier for this purpose (*Home Telephone Co. v. Los Angeles*, 211 U. S., 265, 278) without express statutory provision to that effect. In answer to the present objection, it is sufficient to say that *there is no showing here of an attempt to preclude such resort to the courts*, or to deny to the carrier the assertion of its right unless it can be found in the severity of the penalties attached to the disobedience of the order, and if it were assumed that these would be open to objection as operating to deprive the carrier of a fair opportunity to contest the validity of the Commissioners’ action, still the penal provi-

sions would be separable and the force of the remaining portion of the statute would not be impaired." (Citing authorities.)

We further submit that it is no answer to the city's argument to cite cases wherein there was no court recourse provision as in the ordinance of April 21, 1914.

Appellees on page 9 and 79 cite at length from *Iron Mountain Railroad Company v. Memphis*, 96 Fed., 113, on the question of jurisdiction. In that case the City of Memphis undertook to *abrogate an existing contract* or franchise. The court held:

"A resolution of a city council, passed with all the forms required for the passage of ordinances, adjudging that there has been a breach by a railroad company of a contract by which the city granted to it an easement and franchise in a street, *and declaring a forfeiture of the rights granted*, and a resumption of possession of the street by the city, although conditioned upon a failure of the company to comply with certain requirements within a specified time, which time has elapsed, and the condition has not been complied with, is a law of the state, within the meaning of Section 10 of Article I of the Constitution, against the impairment by a state of the obligation of contracts." (Syl. 3.)

We thus see that this cited case is very different from that at bar.

THE MILLCREEK VALLEY CASE 18 O. C. C., 216.

This case was considered by the City in the brief in chief on page 27 and following. In addition to what we said there, we would call attention to the fact that a request made of the county commissioners by the Village

of Carthage for a grant to the predecessor in title of the appellees was made at the instance and request of the grantee. This request was made February 11, 1889, and after the application to the Village of Carthage for a grant by that village, which was made January 28, 1889, see Record, page 218. We here copy the request first above mentioned (Record, pp. 218, 219):

EXHIBIT '9.'

"OFFICE OF THE CIN. INC. PLANE RY. CO.

"CINCINNATI, February 11, 1889.

"*To the Honorable Council of Carthage:*

"Gentlemen: Our application to the County Commissioners for permission to extend our road from its present terminus at the Zoological Garden to the village of Carthage is opposed by an application from the Cincinnati Suburban R. R. Co., represented by Mr. McCrea. The Commissioners can by a simple resolution give us the right to go ahead, as it will be an *extension* of an existing road, but in the case of our opponents a route must be established, bids advertised for, and acted upon, all making the loss of much time, and probably ending in injunction and litigation preventing for a long time to come the construction of any road.

"We do not believe our opponents are in a condition to construct a road to the center of Cincinnati, but expect to depend upon any arrangement they can make with some existing road, either to buy out their grant or carry their passengers. * * *

"*We think it very desirable that the citizens and Council of Carthage should declare their preference, as between the two applications, in unmistakable terms, and notify the Commissioners at their meeting upon Wednesday a. m. next.*

"THE CINCINNATI INCLINED PLANE RY. CO.,

"By J. M. DOHERTY, Sect'y."

Complying with the foregoing request the Village of Carthage obligingly passed the resolution found on page 224 of the Record. As Carthage had no jurisdiction outside its limits a grant from the County Commissioners for the unincorporated territory was necessary.

We further note that it is not correct to assert, as appellees do, that the village grant was not mentioned in the opinion in the *Millcreek Valley* case (18 Ohio Circuit Court Reports, 216). The following passage is copied from the opinion as found on page 109 of appellees' brief:

"The Village of Carthage did more than to stand by and silently see the corporation, the predecessor of the plaintiff in the chain of title, construct a street railroad in and upon its streets. It, by *resolution* and by *solemn acts* of its Council urged and encouraged it to do so. How can that same village be heard to say that the action of its council was wrong, unauthorized, and that it had no power to give the privileges or make the grants" (note the plural) "it attempted to do? We think this is a question the village is not in a position to raise in a court of equity."

Certainly the village could not repudiate its "grants" within the twenty-five year period.

Note that in the *Millcreek Valley* case complainant put in evidence the Bill of Complaint in the Louisville Trust Co. foreclosure case containing the averment—

"that under and by virtue of the grant of the said Zoological Land Syndicate and the resolutions of the Board of County Commissioners of Hamilton County, and with the *consent of the villages of Clifton, St. Bernard, Elmwood and Carthage,*" etc. (Record, 234.)

Note that when the county commissioners, under Section 2 of the act found in 90th Ohio Local Laws, 243, made the Carthage pike south of Gas Hall "a free turn-pike road," all payments under the county grant ceased.

CONCLUSION.

We therefore submit we have shown appellees have no franchise at all over the 241 feet at the Zoo entrance, nor any franchise over Erkenbrecker avenue to Carthage pike, that the county grant is not good for more than twenty-five years, that the grant in Carthage south of Gas Hall has expired, as well as the grant north of Gas Hall, which is merely an extension thereof, the same being true also of the Hartwell grants, and that there is no grant at all for the east track and part of the west track in the Springfield pike.

We further note as to the county grant in Springfield pike that it was made March 14, 1900 (Record, 263), which was after the decision in the case of *Citizens Electric Railroad v. County Commissioners*, 9 Ohio Circuit Court, 183, and 56 Ohio State, 1, and so flatly in the face of the Supreme Court's decision that a municipal grant was necessary.

For the sake of brevity we must refer for the detail of the City's argument on the foregoing points, which are not contained in this reply brief, to the City's brief in chief.

Inasmuch as the ordinance attacked is valid if over any part of the line appellees have no franchise, or having had one it has expired, and as in point of fact we

believe this has been established, the decree of the trial court should be reversed.

Respectfully submitted,

CHARLES A. GROOM,

City Solicitor,

CONSTANT SOUTHWORTH,

Assistant Solicitor,

Counsel for the City of Cincinnati.

October 14, 1916.

MAP

TOO

LARGE

FOR

FILMING

FILED
OCT 16 1917

JAMES D. MAHER
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1917.

No. 10.

THE CITY OF CINCINNATI, APPELLANT,

vs.

THE CINCINNATI & HAMILTON TRACTION CO.
ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT ON
REARGUMENT.

CHARLES A. GROOM,
City Solicitor of Cincinnati,
Counsel for Appellant.

(24,344)

IN THE
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**SUPPLEMENTAL BRIEF FOR APPELLANT ON
REARGUMENT.**

The following facts are established by exhibits in the record:

That the Cincinnati Inclined Plane Railway Company, predecessor of appellee, applied to the Commissioners of Hamilton County on January 28, 1889, for permission to extend its street railway over the Carthage turnpike to the northern terminus of said turnpike in the village of Carthage (R., 215), and ~~on the same day~~ petitioned the council of said village for permission to occupy and operate through

later

the village, reciting the application to the Commissioners (R., 218).

That on February 11, 1889, said company wrote to the village council that its application was being opposed by another company applying for like right and requesting the village council to declare its preference between the two applications in unmistakable terms and so notify the County Commissioners (R., 218), and on February 12, 1889, said village council passed a resolution requesting the County Commissioners to grant the right of way to the Cincinnati Inclined Plane Railway.

That, on March 19, 1889, the council of the village of Carthage granted the application made to it for permission to occupy the Carthage turnpike through the village of Carthage to the fair grounds *subject to acceptance in writing* within thirty days (R., 16), and amended the same April 16, 1889 (R., 276), and that the grant, as amended, was accepted by the railway on the same day (R., 277).

That on March 23, 1889, the County Commissioners granted the application made to them (R., 14), on condition that the road be put in operation within twelve months "from the time said company shall have acquired the legal right to so construct."

It thus is evident that the Inclined Plane Company, fearing a competitor for the right, was not content to rest upon its application to the County Commissioners and the request of the village council to the said Commissioners to make the grant to it, but procured the village to operate without regard to the Commissioners and enact a grant to it under the laws applicable to municipal corporations, sections 2501, 2502, 3438 and 3439 (Statutes-Appendix, pages 1 and 3), limiting the duration of the grant to twenty-five years. Thus the company accepted (R., 277), and regardless of the County Commissioner's grant it thus, *by contract with the village*, subjected itself to the municipal control, and took

a franchise grant under the municipal law limited to twenty-five years' duration within the village territory.

Wheeling & Elm Grove R. R. Co. vs. Town of Triadelphia, 58 W. Va., 487.

As said in *C., C., C. & St. L. Ry. Co. vs. Urbana B. & N. Ry. Co.*, 5 Circuit Court Reports (new series), 583; affirmed 73 Ohio St., 364 (Statutes-Appendix, at page 33):

"In case of conflict as to city lines or extensions, the more general provisions of section 3437, Revised Statutes *et seq.*, must yield to the more specific provisions of sections 2501, Revised Statutes *et seq.*"

Again (at page 34, Statutes-Appendix) it is said:

"The history of the legislation, as well as the language of section 3438, Revised Statutes, shows that an extension from without, into or through a municipality, is, as to the part of the line within the municipality, a new route."

It has been the consistent legislative policy of Ohio to preserve to the municipalities the right of local self-government, and the right to control the terms and conditions upon which easements in the streets shall be granted has consistently been referred to the municipal officers in carrying such policy into execution.

Louisville Trust Co. vs. Cincinnati, 75 Fed., 296, at 308.

Cincinnati vs. Cincinnati Inclined Plane Ry. Co., 30 Weekly Law Bulletin, 321, at 325, column 1. Affirmed on opinion of court below, 52 Ohio St., 609.

The pertinent quotations from the above cases are set forth in our original brief, filed in 1915, at page 22, and for brevity we will not repeat here.

It seems apparent, then, that when the legislature, by section 2502, Revised Statutes (Statutes-Appendix, page 1), limited municipal grants to periods not to exceed twenty-

five years from the date of the grant, gave municipal councils the "care, supervision and control of all public highways, streets * * * and bridges within the corporation," section 2640, Revised Statutes (Statutes-Appendix, page 26), and then provided that street railways "may be constructed or extended within or without, or partly within and partly without, any municipal corporation," and that the "right *so* to construct or extend such railway within or beyond the limits of a municipal corporation *can be granted ONLY by the council thereof*," section 3437 and 3438, Revised Statutes (Statutes-Appendix, page 3), it was in pursuance of such settled policy of conferring control of such matters upon the municipalities and to prevent the acquisition of franchise rights to operate street railroads in municipalities from any other source and to secure to the cities and villages the valuable emoluments of such grants and the privilege of dealing for renewals at the end of the period of limitation fixed in section 2502, Revised Statutes, with the changed conditions of growing communities in view.

The legislature realized that the county roads extending into the villages of the State were usually the main arteries most desirable for street railroad purposes and it is not reasonable to assume that it limited grants for street railroads to twenty-five years on the undesirable streets, to be granted by the villages, while permitting the county commissioners to make unlimited grants on the desirable public ways without regard to the municipal desires, when it declared that the right to construct or extend within or beyond the limits of a municipal corporation can be granted *only* by the council thereof.

The grants north of the Carthage grant of 1889 are extensions of that line in express terms (R., 17, 19, 22) on Main and Lockland Avenues and on Wayne, Woodbine and Decamp Avenues, which expired with the time limit of the line grant so extended.

Cleveland Electric Ry. vs. Cleveland, 137 Federal, 11.
Blair vs. Chicago, 201 U. S., 400.

The line on the Springfield Pike is a continuation and extension of the foregoing, north from Decamp Avenue and was constructed without grant or consent of the village of Hartwell, in which the east track lies, in plain violation of section 3438, Revised Statutes (Statutes-Appendix, page 3).

We have shown in the brief in chief, filed in 1915, that the period of twenty-five years had not expired at the time of the various suits, pleaded as *res adjudicata* (Brief in chief, pages 25 to 37), and respectfully submit that in determining whether there is a contract the settled legislative policy of the State, conferring the right to grant franchises upon municipalities when municipal territory is affected, is decisive, particularly when the railway affected contracted with the municipal corporation for rights within its territorial limits.

If there is any doubt or ambiguity arising through the existence of the action of the company applying for and taking grants purporting to cover the same territory, or whether the Commissioners or the village council had exclusive power to originate the grant within or extending in municipal territory, or conflict in the statutes, such doubt or ambiguity, in accordance with the principle that ambiguity should be resolved in favor of the public and against the grantee, applies with equal force.

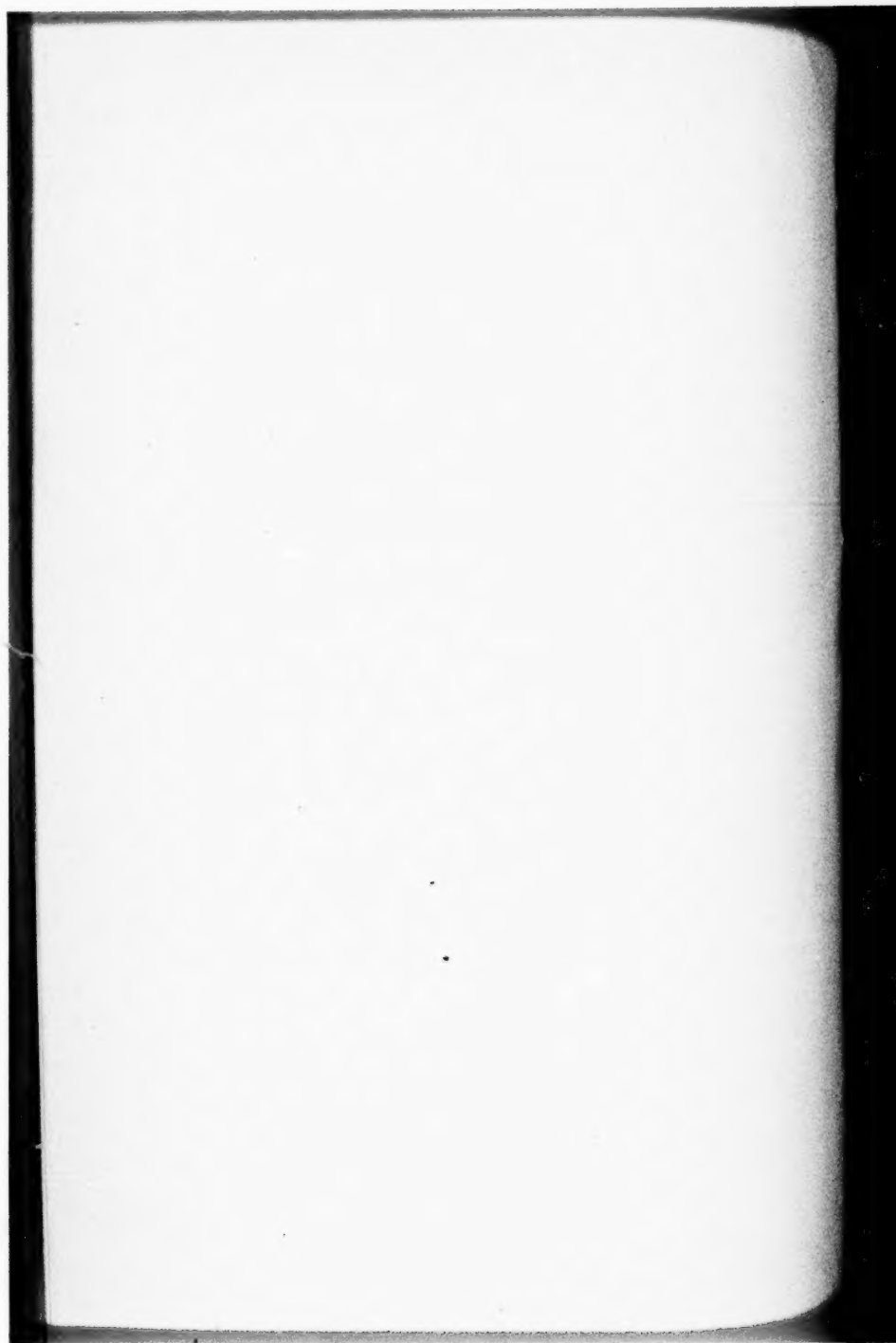
Detroit United Railways Co. vs. Detroit, 229 U. S., 39, at 44.

Central Transportation Co. vs. Pullman Car Co., 139 U. S., 24, at 49.

East Ohio Gas Co. vs. Akron, 81 Ohio St., 33, at 52 and 53.

All of which is respectfully submitted.

CHARLES A. GROOM,
City Solicitor of Cincinnati,
Counsel for Appellant.



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Supreme Court of the United States.

October Term, 1916.

THE CITY OF CINCINNATI,

Appellant,

No. 37.

versus

*THE CINCINNATI AND HAMILTON TRACTION
COMPANY and THE OHIO TRACTION
COMPANY,*

Appellees.

BRIEF FOR APPELLEES ON REARGUMENT.

This brief is a substitute for all briefs and appendices heretofore filed for appellees.

STATEMENT.

The Cincinnati and Hamilton Traction Company is the owner, and The Ohio Traction Company is the lessee of a line of electric railway, extending from the intersection of Vine Street and Erkenbrecher Avenue (known as the "Zoo Entrance"), in the City of Cincinnati, northwardly through territory, part of which was in the villages of St. Bernard, Elmwood Place, Avondale, Carthage, Lock-

land and Hartwell, and part outside any municipality, but in Hamilton County; and northwardly through Butler County to the City of Hamilton in that County. This line was acquired through various grants. (Bill, Rec. 1.)

Prior to the time of the bringing of this suit, the villages in question, except St. Bernard and Elmwood Place, had been annexed to the City of Cincinnati.

On April 21, 1914, the Council of the City of Cincinnati passed an ordinance (R., 7-9), reciting with reference to the grants of the Appellees, that—

“On portions of the streets so occupied and used, alleged grants have heretofore expired, and, on other portions, including that part of Carthage Pike, formerly known as Springfield Pike, there never have been any grants, and said Companies have no longer any right to occupy the same.”

The ordinance then provided that from its taking effect the appellee should be permitted to operate over the line in question only upon a day-to-day license, at a reduced fare, and with transfer privileges to the line of the Cincinnati Traction Company, another and different Company, not a party to the ordinance or to this case.

The ordinance contained other onerous provisions, among others, Section 4, which is as follows:

“The continuing by said Companies or either of them, to operate street cars on said streets, shall be deemed an acceptance of this ordinance, and of all the terms hereof.”

In view of the facts, among others, that continued operation after the passage of the ordinance might be treated as an acceptance by the Companies of the terms of the ordinance, and, that in any event, such operation

would lead to controversy and altercations with passengers over the question of fares and transfers, the Companies brought suit in the United States District Court for the Southern District of Ohio to enjoin the enforcement of said ordinance, on the ground that by said ordinance the City repudiated and violated the grants under which the Companies were operating, and "thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10, of the Constitution of the United States," and that the enforcement of the Ordinance would "deprive plaintiffs of their property without due process of law, and without compensation, in violation of the Constitution of the United States, and particularly Article XIV, in amendment thereof."

A preliminary injunction was granted, and, on final hearing, it was made permanent. (Rec., p. 45.)

The opinion of Judge Sater, which covers the case very fully, is to be found on page 29 of the record.

STATUTES.

In Appendix No. I we furnish a correct copy of Sections 3437-3443 Revised Statutes of Ohio, Smith & Benedict, 1890, which are the sections relating in a general way to street railways, and Sections 2501-2505 of the same edition, which relate to street railway grants by municipal corporations.

The City has filed with its brief an appendix entitled "STATUTES—APPENDIX TO THE BRIEF OF THE CITY OF CINCINNATI, APPELLANT." That appendix contains the statutes above referred to but they are in several places quoted incorrectly.

Many of the other statutes quoted in the City's "Statutes-Appendix" are, we think, irrelevant, such as the provisions of the General Code of Ohio in force in April, 1914, quoted on pages 18 to 25 of said appendix; also the Statutes of Ohio of 1880, quoted on pages 1 to 4 of said appendix.

Section 9105 on page 22 of that appendix is incorrectly quoted and Section 9119 on page 24 is not a quotation at all, but as those sections are irrelevant we have not furnished correct copies in our Appendix No. 1 hereto.

Ohio statutes are cited in this brief as follows: O. L., Ohio Laws, being the publication of the laws of each session of the Legislature; R. S., Revised Statutes of Ohio, being the official revision of 1880 as amended from time to time; and G. C., General Code of Ohio, being the official revision of 1910.

EXPLANATION OF TERMS.

For the readier apprehension of the use of certain terms in this brief, we call attention to the fact that the state of Ohio is divided territorially for governmental purposes into counties and townships, neither of which subdivisions is a municipal corporation. A county is a certain area whose chief governmental body is a board known as County Commissioners. A township is a territorial subdivision of a county, and we have no direct concern with it in this case save that the term is sometimes used in quotations or in reference to other cases. The municipal corporations of the state are within the counties, and the portion of the territory of the state included within the limits of a municipal corporation is nevertheless a part of the county within which it is situated.

Prior to 1902, municipal corporations were divided into hamlets, villages and cities; cities were divided into classes and classes into grades; so that each of the more important cities of the state constituted a separate grade of a particular class. This classification, though upheld by the Supreme Court of Ohio for a long period, was, about the year 1902, in a series of decisions by the Supreme Court, *e. g.*, *State, ex rel, v. Jones*, 66 O. S., 453, and *State, ex rel, v. Beacom*, 66 O. S., 491, held to be a sham classification and violation of the provision of the Ohio Constitution forbidding the conferring of corporate power by special act. As we shall see hereafter, such special legislation was nevertheless upheld, where private rights had theretofore vested under its authority.

In 1902 a law was passed whereby all municipal corporations having a population of 5,000 or more are classed as cities, and all others as villages.

ARGUMENT.

The line of electric railway in question is made up of several parts, which we may call "links," and which are based on different grants, some of which are perpetual, and others of which expire at various times. We claim that none of them had expired at the time of the passage of the ordinance complained of, and that they are all in full force and effect at this time.

Counsel for the City seeks to put appellees in the position of claiming franchises "by estoppel," and then proceeds to attack such a method of acquiring franchises.

The appellees do not claim by estoppel, but by express grants, and the opinion of the Court below is based on express grants. The estoppel referred to in the Court's

opinion relates principally to the effect of certain litigation, to which the City of Cincinnati was, either actually or in effect, a party, and in which appellees' rights were adjudicated.

THE ORDINANCE IMPAIRS THE OBLIGATION OF CONTRACTS IF
THE PLAINTIFF HAS A VALID, UNEXPIRED CONTRACT FOR
ANY PORTION OF THE LINES.

The City does not seek to eject plaintiffs from the occupancy of any particular part of the streets in question, but undertakes by the ordinance complained of to require plaintiff, in disregard of its rights under existing contracts, some of which the ordinance assumes may be good, either to abandon its line over the route in question, or to operate it on a day-to-day license and at a reduced fare.

The question, therefore, is not whether there is one bad link, but whether there is one good link, because, if there is a good link, the ordinance impairs its obligation.

The preamble is a declaration that the appellees have no rights on any of the streets mentioned. Section 1, which names all the streets, ordains a day-to-day license thereon to take effect immediately upon the terms and conditions of the ordinance "and upon no other." Section 2 ordains that the operation of street cars on all those streets shall be subject to: (a) the requirement to operate cars over the entire line and also to Sixth and Walnut streets in Cincinnati, a part of which route belongs to the Cincinnati Traction Company, a separate company; (b) a reduced fare; (c) transfers with the Cincinnati Traction Company, a separate and independent line, not a party to the ordinance or any of the franchises; and (d) fur-

ther regulations to be made by the Director of Public Service.

By Section 4, the operation of cars by either of the companies on the streets mentioned shall be deemed an acceptance of all the terms of the ordinance.

All parts of the ordinance go into operation at once at "the earliest period allowed by law," which is thirty days after it is filed with the mayor. The day the ordinance takes effect it gives to passengers the right to a reduced fare and transfers; and at the same time the companies, by operating on the said streets, are deemed to have accepted all the terms of the ordinance, which apply to all the links. This operation of the ordinance, and these results, do not await any litigation or any adjudication of any kind.

The result, therefore, is that the ordinance undertakes to prevent the operation of cars on any streets covered by the entire line except upon these conditions; so that, assuming there is one good link in Hartwell, for instance, the ordinance prevents the operation of cars over that link, except upon the terms of the ordinance.

It is claimed that Section 3 has the effect of making the ordinance inapplicable to any valid link. But this is not true. The ordinance declares that appellees are without rights on any of the streets named; applies in unequivocal terms to all of them, and takes effect as to all of them on the day the ordinance becomes a law.

Section 3 is as follows:

"Should it be adjudged that on only a portion or portions of the said streets now occupied by the tracks of said the Cincinnati and Hamilton Traction Company the right to operate street cars has never been granted, or if granted has ceased to exist, then this ordinance shall be con-

strued to forbid the further operation of street cars on such portions except on the compliance by the said the Cincinnati and Hamilton Traction Company and the Ohio Traction Company and each of them with all of the terms and conditions specified in this ordinance."

This section does not itself ordain anything or subtract anything from what is ordained elsewhere in the ordinance. It is not strictly a part of the ordinance or in itself an exertion of legislative power. It does not take effect when the ordinance itself takes effect, but only when some indefinite judgment has been rendered by some undescribed authority. Even after the adjudication referred to in Section 3, that section does not definitely forbid the further operation of street cars on any specified portions of the streets referred to, but on such portions as the indeterminate authority shall name in its adjudication.

While Section 3 provides that on such adjudication the "ordinance shall be construed to forbid the further operation of street cars on such portions" (where it is adjudged that there is no right) "except on the compliance * * * with all of the terms," etc., of said ordinance, it does not purport to abate or withdraw—following such adjudication—the application of the same terms of the ordinance to the portions not covered by such adjudication. In view of the emphatic declaration of the ordinance that the appellees are without rights on any of the specified streets, and the definite imposition of the new conditions on all said streets, Section 3 can not be regarded as an intended or efficient abrogation or repeal of the new conditions as to any part thereof, to take effect in the event of the possible adjudication.

Even if it could be so regarded, however, it would not help the ordinance, because the damage would be done before any such adjudication.

The ordinance purports to create a status, to take effect immediately, imposing duties upon the companies and conferring rights upon intending passengers, all in violation of existing contracts (assuming any of the links to be supported by a valid and existing grant), and it ordains a continued operation of cars to be an acceptance of such duties. While Section 5 authorizes and directs the city solicitor in the event of non-compliance to take the proper legal proceedings to enforce the ordinance, they might not be taken, and the operation of the ordinance does not await the beginning or outcome of such proceedings, nor is the city precluded by Section 5 from enforcing it in any other way, by tearing up the tracks or otherwise. Nor is the company relieved, pending or in the absence of such legal proceedings, from controversies with its passengers over fares and transfers, and damage suits arising therefrom, or from claims by abutting property owners that it is maintaining a nuisance.

In the case of *Iron Mountain Railroad Co. v. City of Memphis*, 96 F., 113, hereinafter discussed more fully, page 79, Judge Taft, speaking for the Circuit Court of Appeals of the Sixth Circuit, said, with reference to an ordinance there under discussion (page 130):

“It impairs the obligation of a contract if it purports by force of law to authorize any one to do that which would be a breach of the contract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and right of possession in the city, it authorizes the city offi-

cers peaceably to take possession of the street, and to take up the tracks, and would doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them."

It was also said on page 131:

"In the case at bar we have a law which, if that which is recited to be a fact by its terms is not a fact, purports to give state authority to commit acts which would be breaches of a contract. It purports to restore the street to the city, so that private citizens would be authorized thereby to treat the same as city property, and city officers would be authorized to take peaceable possession, peaceably to take up the tracks, and to remove other property of the grantee therefrom. It seems to us that this is a law impairing the obligation of a contract if founded on a non-existent breach of a condition."

The ordinance by its unequivocal application to all streets, and its immediate operation, paralyzes the enjoyment by the companies of their contractual rights on any part of the line, and such impairment is not relieved by a possible modification of the scope of the ordinance as the result of a subsequent and suppositious "adjudication."

A city can not thus play fast and loose with contractual rights. When it undertakes by ordinance to prevent instantaneously and by the very force of the ordinance the operation of an entire line in accordance with a series of grants, where the ordinance declares and is based upon the expiration or non-existence of all such grants, it must take its chances that its declaration and theory in that regard are correct; if not, the ordinance must fall, and it can not be saved by such a feeble device as Section 3.

It was open to the city, without such an ordinance, or an attempt to create such a status, to bring proceedings to oust the companies from any parts of the line which it supposed they were occupying unlawfully, and in the event of such ouster to impose terms for future occupancy. In creating the status first—as to all the links—and providing for an adjudication later, it was putting the cart before the horse.

It follows, therefore, that even if some link in the plaintiff's line should be defective, the operation of the ordinance should nevertheless be enjoined. It will be time enough to consider the rights of the city in respect to such defective link when an ordinance is passed undertaking to deal with that link. This ordinance is not such an ordinance, but is one which undertakes to impair the obligation even of valid grants.

This ordinance is not, as claimed by the city solicitor, an adaptation to local conditions of the ordinance of the city of Detroit, sustained in *Detroit United Railway Co. v. Detroit*, 229 U. S., '39. In that case certain franchises expired by their terms in the year 1910. The city adopted a resolution that on the streets covered by those franchises the company might temporarily operate upon the payment of a rental of \$200 a day to the city; that otherwise the company must cease to operate and remove its tracks. The company claimed that while the franchises by their terms had expired, they had been extended by a subsequent ordinance and were still in force. There was no question whether some had expired and others had not; all had expired, or none. This court held that the grants had all expired and that the city could therefore require the company to remove its tracks and cease operating, if it did not desire to continue operation under the terms proposed by the city.

THERE IS NO DEFECTIVE LINK.

While the enforcement of this ordinance should be enjoined if there is any good link, nevertheless we submit that there is no defective link and that the plaintiffs have a perfect right to maintain and operate a street railway over all the streets named in said ordinance.

THE RULE OF CONSTRUCTION.

We shall consider the several grants in detail hereafter, but we desire first to refer to the rule of strict construction invoked by the City Solicitor.

Counsel contend at considerable length that public grants in case of ambiguity are to be construed against rather than in favor of the grantee, but they do not point out any ambiguity in this case to call for the application of the rule.

They cite the case of *Blair v. Chicago*, 201 U. S., 400. On page 472 the court says that the rule

“requires such grants to be made in plain terms in order to convey private rights in respect to public property.”

The court quoted with approval the decision in *Perrine v. Chesapeake & Delaware Canal Co.*, 9 Howard, 172, 192, where it was said:

“The rule of construction in cases of this description * * * is this, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public and the corporation can claim nothing that is not clearly given by the law. We do not mean to

say that the charter is to receive a strained and unreasonable interpretation contrary to the obvious intention of the grant. It must be fairly examined and considered and reasonably and justly expounded."

The court said on page 473:

"Grants of this character are not to be destroyed by an unreasonable or narrow interpretation."

In *Citizens Bank v. Parker*, 192 U. S., 73, the Court states the limits of this rule in the following language on pages 85 and 86:

"The exemption of the charter includes a license tax. This, for the reason stated, must be regarded as part of the contract between the State and the bank. And in reaching that conclusion the rule requiring a strict construction of statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we can not concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other

tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute."

In the case of *Detroit Citizens St. Ry. Co. v. City of Detroit*, 64 Fed., 628, decided by the Circuit Court of Appeals of the Sixth Circuit, composed of Judge Lurton, Mr. Justice Jackson and Judge Sage, Judge Lurton expressed himself about this rule much to the same effect as this court in *Citizens Bank v. Parker, supra*. He says on page 640, after referring to the rule:

"But the books abound in rules of construction. They all have one end in view, and that is to ascertain and declare the intent of the act under construction."

We call the court's attention to his discussion and application of that rule.

The case of *Detroit United Railway Co. v. Detroit*, 229 U. S., 39, *supra*, which is quoted by counsel on this point, was one in which the company claimed that the City of Detroit had extended the term of certain expired ordinances therein described by a general street railway ordinance prescribing rates of fare; the court said (p. 44):

"The argument is that, as this ordinance obligates the Railway for the full term of the township grants, which do not expire until December 14, 1921, to sell tickets and transport passengers over its railway, including the portion covered by the now expired grants, the last named grants of the Railway were thereby extended to expire at the same time with the township grants, because only by such construction can the obligation of the Railway to furnish

transportation for the full term of the township grants be complied with, that this was a contractual obligation proposed by the City and accepted by the Railway, and necessarily extended the grants of the Railway."

While the court referred to the rule of strict construction, it did not regard the claim of the railway company as presenting even a close question. It held that the grants had not been extended as the railway company claimed, and said that "any other construction of this ordinance is forced and unnatural" (page 45).

Cleveland Electric Ry. Co. v. Cleveland, 204 U. S., 116, is a similar case where a renewal of grants was sought to be inferred from certain ordinances relating to another subject, which were obviously not intended to operate as a renewal.

The case of *Blair v. Chicago*, *supra*, is an excellent illustration of the application of the rule. In that case the street railway company had certain twenty-five year grants in the City of Chicago; the corporate life of the company was twenty-five years. In 1865 (page 416) the General Assembly passed an act extending the corporate life to ninety-nine years. In the second section of the act the existing grants to the street railroad company were confirmed

"upon such terms and conditions, and with such rights and privileges, immunities and exemptions, as the said common council has or may by contract with said parties, or any or either of them prescribe."

Then follows some obscure language which the company contended was an extension of its franchises in the City of Chicago for a period of ninety-nine years.

The Court very justly held that the section had clearly confirmed the grants as made, or as they should thereafter be made by the City Council and that the subsequent language, which it was claimed extended the grants for ninety-nine years, was not sufficiently clear to support the claim in view of the preceding language which clearly confirmed the contracts as made with the City Council with limited terms.

An examination of recent decisions of this court will show that it has considered these public grants with a view to determining their fair construction, and has not seized upon provisions in the grants or in constitutional and statutory provisions relating thereto, which might possibly have been used to defeat them.

For instance in the case of *The Old Colony Trust Co. v. Omaha*, 230 U. S., 100, the City of Omaha made a simple grant of a right of way for the erection and maintenance of poles for the purpose of transacting a "general electric light business" upon the streets, etc., of Omaha. The ordinance contained the following language:

"And provided further that whenever the city council shall by ordinance declare the necessity of removing from the public streets or alleys of the city of Omaha the telegraph, telephone, or electric poles or wires thereon constructed or existing, said company shall, within sixty days from the passage of such ordinance, remove all poles and wires from said streets and alleys by it constructed, used or operated."

The City of Omaha claiming that the company had no right to sell electricity for heat or power purposes, adopted an ordinance directing the disconnection of all wires transmitting electricity for such purposes.

The court first considered the question whether the company had a perpetual grant, that is, whether or not its entire grant to furnish electricity for any purpose had not expired. It was urged that the ordinance being silent as to time and containing the clause above quoted for the removal of all equipment on notice, it was open to the construction that it was terminable upon sixty days' notice from the city.

If there had been applied to that ordinance the rule of strict construction described by the City Solicitor in this case, the court might have held that there was no clear indication of an intention to grant a perpetual franchise, but this court held that a reasonable construction must be adopted and held the grant to be perpetual, saying:

"What is meant undoubtedly is that, whenever there is public necessity for removing the poles and wires from the streets and alleys, the council shall have power by ordinance to require that that be done."

The court also held that the ordinance was not a violation of the provision of the State Constitution that

"no law making any irrevocable grant of special privileges or immunities shall be passed."

The Court in reaching this conclusion based its decision upon a state decision, but said:

"This contention is answered and *shown to be untenable* by the decision of the Supreme Court of the state in *Plattsmouth v. Nebraska Telgph. Co.*, 80 Neb., 460."

The court then went on to deal with the question whether the grant to do a general electric lighting business included the right to furnish electricity for heat and

power purposes. The court held that the City of Omaha had acquiesced in the conduct of such business by the company and could not, therefore, terminate the heat and power business which was then being done by the company.

See, also,

Louisville v. Cumberland Telegraph & Telephone Co., 224 U. S., 649.

THE GRANTS CONSIDERED SEPARATELY.

With a proper understanding of the rules of construction as applied by this Court, the several grants may now be considered in detail.

LITIGATION IN FEDERAL COURT. LOUISVILLE TRUST COMPANY V. CITY OF CINCINNATI AND THE CINCINNATI INCLINED PLANE RAILWAY CO.

The present complainants trace their title to the first three grants hereafter discussed, to a judicial sale in a consolidated foreclosure suit in the Federal Court for the Southern District of Ohio.

That litigation arose in this way. In a suit between the City of Cincinnati and The Cincinnati Inclined Plane Railway Co., the original grantee, the State Courts had held that all the franchises of The Cincinnati Inclined Plane Railway Co. between Fountain Square and the then north corporation line were either invalid or had expired. (*City of Cincinnati v. The Cincinnati Inclined Plane Railway Co.*, General Term Superior Court of Cincinnati, 30 Weekly Law Bulletin, 321. Affirmed on the opinion of the Superior Court, 52 O. S., 609.)

Shortly thereafter, in 1895, the Louisville Trust Company, Trustee under a mortgage of The Cincinnati Inclined Plane Railway Co. filed its bill in equity in the United States Circuit Court for the Southern District of Ohio against the City of Cincinnati, setting up the grants involved in the litigation in the State Courts and also several of the grants involved in the present litigation and praying an injunction against the City from disturbing the Railway Company in the operation and maintenance of its lines and system in the City of Cincinnati. The City answered, taking the same position it had in the State Court litigation and the Circuit Court upheld the City's contention. On appeal to the Circuit Court of Appeals, composed of Judges Taft, Lurton and Hammond, it was held in an opinion by Judge Lurton, that while certain of the company's franchises in the City of Cincinnati had expired, certain other franchises were still in force and the case was remanded to the Circuit Court (76 F., 296).

In the meantime the Louisville Trust Co. had filed a bill in the same court against The Cincinnati Inclined Plane Railway Co. for the foreclosure of the mortgage.

At the close of his opinion (pages 317-318) Judge Lurton referred to the pendency of the foreclosure suit and to the fact that a receiver had been appointed in that suit and suggesting the inherent connection of the two causes and referring to the City of Cincinnati as "a party claiming rights in the mortgaged property." It was evidently in response to that suggestion that upon the return of the injunction case to the Circuit Court it was consolidated with the foreclosure case and the two proceeded together under the title of the foreclosure case. (R., 258). In that case the property and franchises of

The Cincinnati Inclined Plane Railway Co., as they had been adjudicated by the Federal Court, were sold to Charles H. Kilgour by Master Commissioner's Deed dated May 20, 1898 (R., 130).

The portion of the road under consideration in the present action was transferred by Charles H. Kilgour to the Millcreek Valley Street Railway Co. by deed as to a portion (R., 152) and by lease as to the remainder (R., 162).

The Millcreek Valley Street Railway Co. was merged with the Hamilton, Glendale & Cincinnati Traction Co. into The Cincinnati & Hamilton Traction Co., one of the complainants herein (R., 81). The Ohio Traction Co., the other complainant herein, is the lessee of The Cincinnati & Hamilton Traction Co. (R., 85, 100).

1. ERKENBRECHER AVENUE FROM THE ZOO ENTRANCE TO THE CARTHAGE TURNPIKE.

On April 6, 1889, The Zoological Land Syndicate granted to The Cincinnati Inclined Plane Railway Company the right to construct and operate a double track electric railway over and along Erkenbrecher avenue, then a private street, from a point which may be described as the Zoo Entrance to the Carthage Turnpike. (R., 126.)

Under this grant the Railway Company built its road and commenced its operation in the year 1889 (R., 244). Thereafter, on a plat recorded June 27, 1890, Erkenbrecher avenue was dedicated as a public street. (R., opp. p. 278.)

The portion of Erkenbrecher avenue over which the street railway grant extended was about 1,200 feet, about

1,000 feet of which unquestionably belonged to the Zoological Land Syndicate and about 241 feet of which the City claims did not belong to such syndicate, but to the Zoological Society, which joined in the dedication.

As to the 1,000 feet, the City denies the right of the Railway Company because there was no franchise from the City on the street in question, the grant of the Zoological Land Syndicate was not recorded and the dedication was not made expressly subject to the right of the Street Railway Company.

As the Railway Company had a right of way over Erkenbrecher avenue at or prior to the time of the dedication, the City accepted the dedication subject to such right, and no franchise from the City was necessary; its rights are subordinate to the prior rights of the Railway Company. When a city annexes territory, the rights of a street railway therein are not thereby extinguished, but remain and are binding upon the city. (*Bell v. City of Glenville et al*, 5 Ohio Circuit Court Reports, New Series, 461, 464; affirmed without report by the Supreme Court of Ohio, 73 O. S., 392; 75 O. S., 574.)

At the time of the dedication, the street railway line had been constructed and was in operation and the City was thereby charged with notice, which dispensed with the necessity for any record of the instrument.

Actual possession is sufficient notice even to a purchaser for value, "of whatever interest the person actually in possession has in the fee, whether such interest be legal or equitable in its nature, and of all facts which the proposed purchaser might have learned by due inquiry." *Kirby v. Talmadge*, 160 U. S., 379, 383-84.

See also, to the same effect, *McKinzie v. Perrill et al*, 15 O. S., 162.

So far as the stretch of 241 feet is concerned, the Railway Company had a grant which purported to cover that stretch; the real owner of the property, the Cincinnati Zoological Society, had seen a street railway constructed and operated over that stretch, without objection, prior to the dedication to the City; the City acquired a title for street purposes, subject to the evident occupancy by the street railway line without any objection from the real owner.

In view of these facts, and certain litigation to which we will now refer, it is too late for the City to contest the grant of the appellees over any portion of Erkenbrecher avenue.

In the consolidated foreclosure case above referred to (*Louisville Trust Co. v. Cincinnati and Cincinnati Inclined Plane Railway Co.*) it appears that the Trust Company in its original bill against the City, set up, among other grants, the grant from the Zoological Land Syndicate, and alleged its right to operate a street railway line thereunder. The language of the bill is as follows (R., 234).

“That by a resolution of the trustees of the Zoological Land Syndicate passed April 6, A. D. 1889, the said Railway Company was granted the right to construct and extend its double tracks with the necessary appendages and appurtenances of an overhead electric street railroad system, from its then northern terminus at the Zoological Garden and Erkenbrecher avenue and thence along said avenue of which said syndicate were the owners, to the Carthage Pike at or near its intersection with Ludlow avenue.

“Eighth. That under and by virtue of the grant of the said Zoological Land Syndicate and the resolutions of the said Board of County

Commissioners of Hamilton County, and with the consent of the villages of Clifton, St. Bernard, Elmwood and Carthage, the said Railway Company, in the year A. D. 1889, constructed and extended its railway upon said Erkenbrecher avenue and said Carthage turnpike, to the county fair grounds, adjoining the said village of Carthage, a distance of five miles, and subsequently equipped the same with the Sprague Electric System and an additional power house with the machinery for generating electricity, located on the banks of Ross Run, just north of the village of St. Bernard."

Substantially the same allegations were made in the intervening petition of Goodman, another mortgagee, who intervened in the same case. (R., pp. 243, 244.) The City did not, in its answer or otherwise, deny those allegations.

A judgment was entered in the consolidated case, by which all parties, including the City, were bound, finding the Railway Company to be the owner of, and the Trust Company to have a lien upon the line of railway commencing at the Zoo Entrance, as alleged, and running along Erkenbrecher avenue. (R., 138, p. 142.)

Under that decree the Street Railway Line, including the portion now under discussion, was sold, as heretofore set forth, by Master Commissioner's Deed, dated May 28. (See R., 134 for reference to the Erkenbrecher Avenue line.)

The City Solicitor states in his main brief (p. 27) that at the time of that litigation, Erkenbrecher Avenue was outside the City limits of Cincinnati, and that while the City was a party to the litigation, it was not interested in any adjudication with reference to that avenue.

Counsel are in error in this contention, as the dedication occurred in 1890 (R., opp. p. 278) and the litigation in the Federal Court commenced in 1895. In their reply brief, filed prior to the first argument, counsel for the City admit their error in this respect. (p. 16.)

Counsel for the City also claim that at the time of the consolidation of the injunction suit with the foreclosure suit, the City had won a part of its claim, and was not "interested in the later foreclosure proceedings." This we deny.

The sole and only purpose and effect of the consolidation was to involve the City "in the later foreclosure proceedings." The Trustee had claimed certain grants or franchises in the injunction case, among them the private grant over Erkenbrecher avenue. The City attacked some of them, but not Erkenbrecher avenue. The Circuit Court of Appeals found which were valid and which not. It was then in order for the Circuit Court to enter a decree finding for the company (or trustee) upon its claims which were not contested and those found in its favor. But before reaching that stage, the injunction suit was consolidated with the foreclosure suit because (as Judge Lurton had said) the City of Cincinnati was "a party claiming rights in the mortgaged property" (76 F., 318) and it was proper that the respective rights of the parties should be settled in the foreclosure suit where the property was in the custody of a Receiver and was to be sold. Accordingly, the final adjudication of the issues in the injunction suit was in the final decree in the consolidated case. The City was in all respects a party to that decree as fully as if it had been made a defendant in the original foreclosure case as "a party claiming rights in the mortgaged property."

In a subsequent action brought by the Millcreek Valley Street Railway Co. against the Village of Carthage, the company expressly alleged "that the grant for the portion of said electric railway so located in Erkenbrecher avenue as aforesaid, was made by the owners of the property now embraced within the limits of said avenue prior to its dedication to the public and said avenue was dedicated and accepted subject to the grant so made" (R., p. 110). That was one of the issues in the case and the Circuit Court found for the plaintiff on all the issues joined (R., 119). This judgment was affirmed, without report, by the Supreme Court.

Carthage afterwards became and now is a part of the City of Cincinnati.

In 1901 the State of Ohio on the relation of a public officer, the Prosecuting Attorney of Hamilton County, brought its action in *quo warranto* (Rec., 173) against the Millcreek Valley Street Railway Co. et al, alleging, among other things, in its petition that the Millcreek Valley Co. extended its lines and operated them under authority of the grant of the Zoological Land Syndicate in question (p. 181) and prayed that the company be ousted therefrom.

The answer of the Millcreek Valley Street Railway Co. especially set forth the grant of the Zoological Land Syndicate and its rights thereunder from the Zoo Entrance to the Carthage Pike and that Erkenbrecher Avenue was dedicated to the City and accepted subject to said railway grant (p. 187). The answer also set forth the proceedings and sale in the Federal Court above referred to. The State admitted the title of the Zoological Land Syndicate (R. 193). Thus the sufficiency of that

grant was one of the issues in that case and the court found for the defendants on each and all of the issues joined. (Rec., 178.)

We submit that the validity and scope of the grant on Erkenbrecher Avenue are no longer open to question by the City of Cincinnati in any court. The appellees have an easement based on private grant, for the operation of a street railway line over Erkenbrecher Avenue. It is perpetual and the rights of the City on Erkenbrecher Avenue are subject to said grant. They did not need to obtain from the City of Cincinnati and do not now require any authority from said City to operate on Erkenbrecher Avenue.

The thing which was asserted by the respective companies and which was adjudicated in the cases above referred to, was the private grant of a right of way over Erkenbrecher Avenue, then a private street through a private subdivision, prior to the acquisition by the City of Cincinnati of said Erkenbrecher Avenue for street purposes. There is no ground, therefore, for the claim of the City in its original brief (pp. 38-39) that the company obtained nothing more by that litigation than franchise by estoppel which could not be for a longer period than allowed by law for a franchise by express grant.

The thing which the respective companies asserted and which was adjudicated in their favor was not a mere right to use the street, which might be limited in term by the City's power to grant such a right; the thing that was adjudicated was the asserted private and prior grant which did not proceed from the City and which was not subject to any time limitation affecting the City.

2. CARTHAGE PIKE FROM ERKENBRECHER AVENUE TO GAS
HALL IN THE VILLAGE OF CARTHAGE.

The right of the plaintiffs on every part of this section of the line whether within or without any municipal corporation, is based on the grant of the County Commissioners of March 23, 1889 (p. 14).

By the Act of the General Assembly of Ohio of March 24, 1851 (49 Ohio Laws, 147), the Commissioners of Hamilton County were authorized to improve and maintain roads in the county and establish toll-gates thereon.

It is not disputed that Carthage Pike between the points mentioned was a county road.

The power of the County Commissioners to make the grant is found in Sections 3441 and 3443 of the Revised Statutes as they then read.

“Section 3441. If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied.

“Section 3443. Council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated.”

(See Appendix I to this brief.)

In *Railroad v. Commissioners*, 56 O. S., page 1, the Supreme Court of Ohio decided expressly that Section

3441 applies to roads under the control of county commissioners. See page 7 of the opinion.

The respective positions of the county and city or village in the scheme of State government and administration are indicated by the language of the Supreme Court of Ohio in the case of *Commissioners of Hamilton County v. Mighels*, 7 O. S., 109, where the court had under consideration the question whether the Commissioners of a county are liable in a *quasi*-corporate capacity to an action for damages for injury resulting to a private party by their negligence in the discharge of their official functions. Reference having been made in the argument to the fact that municipal corporations were under such a liability, the Court said:

“A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, *of the means of travel and transport*, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy.”
[Italics ours.]

In *Lewis et al v. Laylin et al*, 46 O. S., 663, the Supreme Court of Ohio, in September, 1889,—the very year that this grant in question was made—had occasion to pass upon the power of County Commissioners to improve a

county road within a municipal corporation. The Court said (pages 671-672):

"That a state or county road is not extinguished by becoming a street of a municipal corporation is clear. It retains its character of a state or county road, even as to such portions of it as may chance to fall within the limits of a municipal corporation, that may be subsequently organized; nor is this character changed because the municipal authorities call it a street and give to it a name as such, and are invested by law with its general control. Should the municipality cease to exist, the highway would at the same time cease to be a street, but it would not cease to be the state or county road which it was originally.

"If so apparent a proposition requires support from authority, enough will be found in the case of *Bisker v. Richards*, 9 Ohio St., 485, where it was held, that the laying out of a state road over a county road did not extinguish the latter, but that both might co-exist. If that is so upon the same principle, a state or county road would continue to exist after its adoption by a municipal corporation as a street.

"It has also been held in this state, that under a statute giving the commissioners general power to lay out and establish county roads, they were authorized to lay out and establish a county road *within or through* an incorporated town or city. *Wells v. McLaughlin*, 17 Ohio, 99. Also, one 'whose *termini* are *wholly* within the limits of an incorporated town or city.' *Butman v. Fowler et al*, 17 Ohio, 101. These cases establish the doctrine, that territory, within a municipal corporation, is not exempt from the operation of general laws giving authority to county commissioners respecting public highways."

The Court also said on page 675:

"It is true that Section 2640, in very general terms gives to municipal councils the 'care, supervision and control of all public highways, * * * within the corporation.' The power conferred by this section is full and ample; but it contains no words directly excluding that conferred by the statute upon county commissioners. If it has that effect, it amounts to a repeal of the latter statute by implication. Repeals of this kind are not favored."

In the case of *Wells v. McLaughlin et al*, 17 Ohio, 99, referred to in the foregoing quotation, the Supreme Court of Ohio said:

"It would be a little remarkable if all our county roads were compelled to stop at or go around every incorporated town or city. True, all streets, lanes and alleys in towns are, by statutes, declared public highways. But still, it is not left to the town authorities to decide, unless such power be expressly conferred, whether the streets and alleys of such town are all the roads which shall pass through its corporate limits. Roads are matters of general and public concern, in which the whole community have an interest and a voice. The fact that corporate privileges are conferred upon the inhabitants of a city or town, does not exempt them from the operation of the general laws of the land. A municipal corporation is no more exempt from the operations of general laws than a private corporation.

"But it is said that the county commissioners could not establish the road in question, because it is not a county road; and that it can not be a county road because it lies wholly within the

corporate limits of the town of Wellsville; that the county authorities can only establish roads for the county; township authorities for townships, and town authorities for towns. Now it is not pretended that the county authorities can establish township roads or streets for an incorporated town. But this does not prove that the county authorities may not establish a county road through or within the limits of a township or incorporated town."

In the case of *Butman v. Fowler et al*, 17 O., 101, also referred to in the decision in *Lewis et al v. Laylin et al*, the court said on pages 102-103:

"This road having its *termini* within the corporate limits of the town of Milan, is claimed to have been exclusively within the jurisdiction of the corporate authorities of that town, and beyond the control of the county commissioners. It has already been decided at this term, that the board of commissioners have jurisdiction to establish, alter and vacate county roads, and that the rights and interests of the county are paramount to the control of village corporations, so that the commissioners may enter the limits of the corporation, and establish a county road when demanded for public convenience."

The dominant power of the County Commissioners is also indicated from another angle by the case of *Railroad v. Cummins*, 53 O. S., 683, where the judgment below was, "affirmed on the sole ground that the municipal council has no power to vacate that part of a county road which lies within the municipality."

The policy of the State of Ohio toward this particular turnpike, at or about the time of the Commissioners'

grant, is indicated by the Act of the Ohio Legislature, of April 25th, 1893 (Local Laws, 243), recognizing the exclusive control of the County Commissioners over the Carthage turnpike, and authorizing them to issue bonds and levy a special assessment for the improvement of this pike, including that portion within the village of Carthage. That Act also recognized the Commissioners' grant as being the basis of the street railway franchise of the plaintiffs, for it contained the following language: "That the grading and paving of so much of the roadway as may be occupied by any street railway company, shall be paid for in accordance with the terms and conditions in reference to repairs, contained in the grant by the Commissioners of Hamilton County, to said street railway company, to operate a street railway on said road."

In the case of *State ex rel Kilgour v. Eugene L. Lewis, Auditor*, 13 O. Dec., N. P., page 188, the Common Pleas Court of Hamilton County, in 1902, held that the county commissioners had authority under the general statutes of the State of Ohio (Sec. 4919, R. S. O.) to improve the Carthage Pike from Mitchell Avenue on the south to the northeast terminus of the Carthage Pike at its intersection with Wayne Avenue, a distance which includes the section of Carthage Pike in Carthage. Section 4919 authorized county commissioners to levy a special tax for the improvement of "one or more of the principal highways of any county." The court said "This section therefore provides plainly for the reconstruction and repair of such a road as Carthage Pike," etc. The court followed the ruling of the Supreme Court in *Lewis v. Laylin, supra*. No appeal or error proceedings were taken from the judgment in that case.

THE COMMISSIONERS' GRANT.

The company applied to the County Commissioners on January 22, 1889 (p. 215) for a grant on

“Carthage Turnpike commencing at a point at or near its intersection with Ludlow Avenue and running thence upon and along said Carthage Turnpike to its northern terminus at or near the county fair grounds at Carthage.”

The terminus referred to is the same as “Gas Hall” as heretofore described.

On January 28, 1889, the company sent a communication to the Village of Carthage reciting that the application had been made to the Board of County Commissioners and requesting the Council of the Village to give “permission to occupy and operate its railroad through your village as above contemplated” (p. 218).

On February 13, 1889, the Village of Carthage adopted and sent to the Commissioners the following resolution (p. 224):

“RESOLVED: That the Honorable Board of County Commissioners be and are hereby requested to grant the right of way to said Cincinnati Inclined Plane Ry. Co. to construct an electric street railway over the said Carthage Turnpike as asked in the application to said County Commissioners.”

The minutes of the County Commissioners (Rec., 226) of the same meeting at which the above resolution was received, show the following:

“Petitions were received and read from citizens of St. Bernard, Elmwood and Carthage

and also certified copy of ordinance adopted by the Village Council of Carthage requesting this board (commissioners) to grant The Mt. Auburn Inclined Plane Railway Co. the right to construct a double track electric railway over the Carthage pike."

On March 23, 1889, the grant was made by the County Commissioners (p. 14).

In the meantime, on March 19, 1889, the Council of the Village of Carthage passed a resolution purporting to grant the application of the Cincinnati Inclined Plane Ry. Co. for permission to operate a street railway line in Carthage (Rec., 275).

This resolution was doubtless intended to express the assent of the village to the grant which the village had theretofore requested the Commissioners to make in accordance with the application of the company. As we shall see hereafter, it can not be regarded as having any other effect.

In the subsequent litigation the company relied upon the grant of the County Commissioners. The resolution of the Council of Carthage of March 19, 1889, was either not referred to at all or was merely treated as an assent by the Village of Carthage and an estoppel against any objection on its part.

THE QUO WARRANTO CASE.

The *quo warranto* case (*State, ex rel Hoffheimer, Prosecuting Attorney of Hamilton County, v. The Millcreek Valley Street Railroad Co. and The Cincinnati Street Railway Co.*), brought in 1901 and in which judgment in the Circuit Court was entered in 1904, forecloses the

question. It was an action by the State challenging the rights claimed by the Millcreek Valley Street Railway Co. north of the entrance to the Zoological Garden, among others, the commissioner's grant on Carthage Pike (R. 179, *et seq.*; Amendment to Petition, R. 194). The claims of the Millcreek Valley Co. are set forth in its answer (R. 187) and Amendment (R. 194). The judgment in that case, after finding generally for the defendants, finds specifically that the grant of the County Commissioners was a distinct and independent grant upon the terms therein set forth, to the Cincinnati Inclined Plane Railway Co. of the right to construct, maintain and operate a street railroad on the Carthage Turnpike; that the said grant was duly accepted by the grantee therein named and that the defendant, the Millcreek Valley Street Railway Co., has become the owner of the street railroad therein provided for "and of all the right and franchise to maintain and operate the said street railroad *as in said resolution provided.*"

The judgment of the Circuit Court was entered on January 6, 1904, and is as follows (Rec., p. 178):

"This cause came on to be heard upon the pleadings, evidence and arguments of counsel, and the court being fully advised in the premises, upon consideration thereof finds each and all of the issues joined in favor of the defendants and each of them. And the court further finds that the grant to The Cincinnati Inclined Plane Railway Company made by the Board of County Commissioners of Hamilton County, Ohio, on the 23d day of March, A. D. 1889, as set forth as Exhibit 4 to the amendment to the answer and the additional answer of The Millcreek Valley Street Railroad Company filed herein March 2d, 1903, was not a grant of an ex-

tension of the line of railway then and theretofore operated by The Cincinnati Inclined Plane Railway Company on Vine Street in the City of Cincinnati, but that the same was a distinct and independent grant, upon the terms therein set forth, to the Cincinnati Inclined Plane Railway Company of the right to construct, maintain and operate a street railroad in the Carthage turnpike; that the said grant was duly accepted by the grantee therein named, and that the defendant, The Millcreek Valley Street Railroad Company, has become the owner of the street railroad therein provided for, and of all the right and franchise to maintain and operate the said street railroad as in said resolution provided.

"Wherefore it is considered by the court that the petition in this cause be dismissed and that the defendants and each of them recover judgment against the plaintiff for their costs herein expended, taxed at \$——.

"To all of which the plaintiff excepts.

"And thereupon the plaintiff filed its motion in writing for a new trial of this cause for reasons appearing therein, which motion was submitted to the court, and on consideration thereof the court finds that said motion is not well taken, and doth overrule the same, to which ruling the plaintiff excepts."

This judgment was affirmed by the Supreme Court of Ohio without report. 74 O. S., 453.

It has been suggested that the judgment just quoted does not have the effect which we claim, and which its plain language indicates.

First. Because, it is said, the company claimed under the Carthage resolution, as well as under the Commis-

sioners' grant, and the judgment may be regarded as based on the resolution.

This is untenable, in view of the language of the judgment.

Furthermore, the company did *not* claim under the Carthage resolution. The separate answer of the Millcreek Valley Street Railroad Company (R. 187), shows that the sole claim was under the Commissioners' grant of March 23d, 1889. On page 188, it is averred that said grant of the County Commissioners was "made at the special instance and request of said villages of Carthage and St. Bernard." The only reference to the Carthage resolution of March 19th, is in the amendment to the answer (Rec., 194), where, among other things, said resolution is filed and attached as an exhibit, without comment. This answer was filed by leave, after replies had been filed, and the reference to the Carthage resolution was doubtless intended to support the allegation in the original answer, of the "special instance and request," of the village of Carthage.

The records of the foreclosure case in the Federal Court, and of the injunction case against Carthage in the State Court, are a part of the record in the *quo warranto* case. In the injunction case against the village of Carthage, the grant of the county commissioners alone was relied upon by the company as the foundation of its title, no reference being made to the Carthage resolution of March 19th. The decision of the Circuit Court of Hamilton County, 18th C. C., 216, printed and filed as Appendix II hereto, and affirmed by the Supreme Court of Ohio without report, makes no reference to the resolution of March 19th, but refers to the resolution of Carthage, requesting the commissioners to grant the right-of-way.

The court said, pp. 219-220, *infra*:

"The county commissioners of Hamilton County, having control over the Carthage turnpike, extending from Ludlow avenue to its northern terminus in the village of Carthage, granted to the Inclined Plane Company the right to construct and maintain an extension of its railway in said pike, in consideration of the company paying into the county treasury on January 1st, 1891, \$500, and other designated amounts at fixed periods so long as the pike remained under the control of the commissioners.

"The village of Carthage passed a resolution requesting the commissioners to grant the right of way to said Cincinnati Inclined Plane Railway Company to construct an electric street railway over said Carthage pike."

An examination of the consolidated foreclosure case in the Federal Court will show that the company and the mortgagee relied on the grant of the County Commissioners.

In his opinion in *Louisville Trust Co. v. City of Cincinnati*, 76 F., 296, Judge Lurton said on page 307:

"In 1889, the Cincinnati Inclined Plane Railway Company, having, under proceedings heretofore mentioned, obtained authority to extend its line to Glendale, did extend its line of road from the Zoological Garden about five miles along the Carthage pike, by grants *emanating from the proper county authorities*, to the village of Glendale, in Hamilton County." [Italics ours.]

The reason why the Carthage resolution of March 19th was not relied upon as the source of title is evident from an examination of the resolution (Rec., 275), and of the

statutes (Sections 2501, 2502), governing grants by municipal corporations.

Section 2501 expressly requires that the action of council shall be by ordinance, which shall prescribe terms and conditions upon which the road shall be constructed and operated. If Carthage had intended to make an independent grant, or do anything more than assent to the grant by the Commissioners and invite the construction of the road, it would have taken action in the form of an ordinance, as it did five years later in making the grant from Gas Hall north.

Section 2502 requires that before such an ordinance as is referred to in 2501 is passed, public notice of the application therefor must be given by the clerk of the corporation in one or more of the daily papers, or weekly papers, published in the corporation, for the period of at least three consecutive weeks. There is no claim that there was any advertisement of the resolution of March 19th. On the contrary, Mr. Hammel, who was then the Village Solicitor, has testified in this case that there was no advertisement (Rec., 64).

Moreover, Section 2502 provides that no such grant shall be made except to the corporation that will agree to carry passengers at the lowest rates of fare. Not only is there no showing of compliance with this essential requirement of the statute, but the Carthage resolution of March 19th contains no provision whatever with reference to fares. Five years later when Carthage actually undertook to make a grant of its own, over its own streets north of Gas Hall, its action was not only by ordinance, but it contained specific provisions as to fares in compliance with the statute.

These steps and features, which we have shown to be lacking in the Carthage resolution are all statutory and their absence indicates not only that the resolution *did* not in fact constitute a grant, but also, that it was not *intended* to constitute a grant.

Moreover, the decree in the *quo warranto* case must be regarded as upholding the Commissioners' grant, irrespective of the village action of Carthage, because the Commissioners' grant extended likewise through the villages of Clifton and Avondale, where there was no village action of any kind, and through Elmwood Place, where there was no village grant to the company, but only a later general street railway ordinance (R. 199) and where the power of the Commissioners was distinctly recognized (R. 200).

Second. It has also been suggested that the specific language of the decree in the *quo warranto* case can be accounted for, because there was a claim in the case that if the grant of the County Commissioners was a mere extension to the line of the Cincinnati Inclined Plane Railway Company, no additional fare could be charged, and that the special finding of the Court with reference to the grant of the County Commissioners was merely to indicate that it was not an extension, as claimed. But that result could have been accomplished by the mere statement that the line of the defendants beyond the Zoo entrance was not a mere extension; or, if the court had rested its judgment upon the Carthage resolution of March 19th, its decree would have found that the line covered by the grant of the County Commissioners, *and* the resolution of the village of Carthage, did not constitute an extension. But the court went further and held

specifically, that the Commissioners' grant in question was a distinct and independent grant to the Cincinnati Inclined Plane Railway Company, of the right to construct, maintain and operate a street railroad in the Carthage turnpike and that the Millcreek Valley Railway Company had become the owner of the street railroad provided for, "and of all the right and franchise to maintain and operate the said street railroad as in said resolution provided."

This specific language is not to be accounted for on the theory suggested.

The expression "as in said resolution provided" embraces all of the provisions of the resolution, including the description of the route granted, *i. e.*, "commencing at a point at or near its intersection with Ludlow Avenue and running thence upon and along said Carthage Turnpike to its northern terminus at or near the County Fair Grounds at Carthage."

Third. It has been suggested that the Commissioners' grant did not purport to be independent of action by the villages, because—

(a) By Section 4 (R. 14), villages through which the road is located, were permitted to indicate whether the tracks should be laid in the center or on the side of the street.

But the Commissioners, having power to make the grant, and to prescribe the location of the tracks, could properly permit villages or even abutting property owners, to subserve their own convenience or interest in the matter of the location of the tracks. A familiar illustration of this is where legislative grants to street railway or other public utility companies contain the provision that the engineer or other authority of the mu-

municipality must consent, or may regulate the location of the tracks, poles, wires, etc. In such cases it is held that the municipality does *not* participate in the grant, but is merely given certain local supervision of a grant proceeding from a higher authority. *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 658.

(b) Some significance is sought to be attached to the language in Section 5, that the road is to be constructed and put in operation within twelve months from the time said company, "shall have acquired the legal right to so construct." It has been claimed that this is, in effect, a construction by the County Commissioners that the company did *not* "acquire the legal right to so construct," from the grant made by such Commissioners. But this language, even if unexplained, would not support that contention in view of the unqualified language of the granting clause and the comprehensive scope of the terms of the grant.

However, the language in question is easily explained. "The legal right to so construct" probably referred to the corporate power of the company to extend its line north of the Zoo entrance, which was provided for by an amendment to the Articles of Incorporation voted by the stockholders February 23, 1889 (Rec., 212) after the application was made to the commissioners January 22, 1889 (Rec., 215). The resolution making the grant was doubtless drawn before such amendment had been filed with the Secretary of State. Or it may be that the draughtsman of the resolution had in mind that the "legal right to so construct" dated from the acceptance of the grant by the company or from the giving of the bond on or before April 10th, provided for in Section 9 of the grant.

However, the points which are sought to be raised by these references to the language in the two sections of the grant referred to are foreclosed by the judgment of the Circuit Court, affirmed by the Supreme Court in the *quo warranto* case, which holds that the County Commissioners' grant was a separate and independent grant by the County Commissioners over the entire portion of the turnpike covered by the grant.

The Commissioners' grant was comprehensive in character. It extended over the Carthage turnpike, through the villages of Clifton, Avondale, St. Bernard and Carthage, and through county territory.

A better illustration could not be given of the reason why the law gives County Commissioners the power to make grants to street railway companies over county roads, in and out of municipal corporations. If the construction of this line of railway had been dependent upon separate and distinct grants by every village which was touched, as well as by the county, for the unincorporated territory involved, there might have been a conflict of terms and conditions, resulting in impairment of service and embarrassment to the grantee. All this was avoided by an exercise of their power by the County Commissioners, to make one grant for the entire line, containing all the necessary provisions. The entire work was to be done to the satisfaction of the County Engineer and the County Commissioners. Passengers were to be carried to Fountain Square, and by Section 6, a schedule of fares for each and every part of the route was provided. This is the essential element that was lacking in the Carthage resolution of March 19th.

Fourth. Finally, it is claimed that the judgment of the Circuit Court (affirmed by the Supreme Court of Ohio)

in the *quo warranto* case can not have the effect which its language indicates, because it would thus be in conflict with other decisions of the Supreme Court. That would be quite immaterial if true. The Supreme Court in affirming that judgment held that this particular grant of the County Commissioners, to the full extent therein set forth (which means to the northern terminus of the Carthage pike), was a distinct and independent grant, and that the Millcreek Valley Railway Company was the "owner of the street railroad therein provided for, and of all the right and franchise to maintain and operate the said street railroad, as in said resolution provided."

It is immaterial, therefore, what the other decisions of the Supreme Court may be.

But it is not true that other decisions of the Supreme Court are to the contrary. The case principally relied on by the City Solicitor, is *Electric Street Railroad Company v. Hamlet of North Bend*, 70 O. S., 46, which we respectfully submit has nothing whatever to do with the case. There was no claim made in that case of a right to operate on a county road within a municipality by virtue of a grant from County Commissioners. The highways in question there were streets of the former hamlet of North Bend. The company contended that under the Municipal Code, which had just been adopted, the village of North Bend, having failed to elect village officers, became unincorporated territory, wherein the Commissioners had control of the streets or highways. The Court held that North Bend had become a village in spite of its failure to elect village officers. It followed that the County Commissioners had *not* acquired control of the highways as unincorporated territory.

As a matter of fact, the railroad company did not have a grant from either the Commissioners or the village authorities. But the opinion did not purport to deal with a county road, over which the Commissioners had control, but solely with a village street, over which the village had exclusive control.

In *County Commissioners of Richland County v. Citizens Electric Railway, Light & Power Company*, 56 O. S., 1, the street railway company in Mansfield, Ohio, undertook to extend its line outside of Mansfield, and over a county road, without obtaining a grant from the County Commissioners, and under the alleged authority of Section 3438, Revised Statutes, as follows:

“The right so to contract or extend such railway within or beyond the limits of a municipal corporation, can be granted only by the council thereof, by ordinance,” etc.

The Court held that this did not give the power claimed by the railway company. The Court took very strong ground as to the power of County Commissioners over the roads of the county, and construed Section 3438 as referring merely to a grant of *quasi-corporate* power by a municipality to a city street railway line to extend its operation beyond the city, leaving the company to obtain from the County Commissioners the right to use county roads.

In *County Commissioners v. The A. B. & C. Railroad Company*, 21 C. C., 769, the decision was by the Circuit Court, and it can hardly be claimed by the City Solicitor that the later decision of the Supreme Court in our case is to be construed in the light of that Circuit Court decision. However, all that was held in that case was that because Section 1650, R. S., gave the trustees of a

hamlet *exclusive* jurisdiction of public roads within the limits of the corporation, the trustees of such hamlet had the power to grant a franchise to an interurban street railway company, and that the Commissioners could not object. Attention was called by the Court to the fact that this grant of power to the trustees of *hamlets* was stronger than Section 2640, R. S., giving the control of streets to the council of other municipal corporations.

The appellant has filed as its "Appendix No. 2" a copy of the opinion of the Supreme Court of Ohio in the case of *The Interurban Railway and Terminal Company et al v. The City of Cincinnati*, 93 Ohio State, 108.

That case has nothing to do with the question here involved as appears from the syllabus, which, in Ohio, is the official statement of the court's decision. The syllabus is as follows:

"An ordinance passed by a village council, granting a franchise to an interurban railway company to construct its line through the village, contained the following provision: 'Should the village of Pleasant Ridge be annexed to the City of Cincinnati, the rate of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents.' The company thereafter duly accepted the franchise and constructed, maintained and operated its line thereunder. Subsequently the village was annexed to the city. Held: The acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its road thereunder its terms must control."

The question involved in the case is indicated by the following language from the opinion of the court:

“The position of the Interurban company substantially is, that the village was wholly without authority to prescribe or contract for fares beyond the municipal limits and that notwithstanding that clause was, by agreement of the parties included in the ordinance as adopted, which was thereafter accepted by the grantee, and although the line was constructed and operated under and by virtue of the franchise and is now maintained and operated thereunder, nevertheless it is entitled to disregard and eliminate the provision objected to and yet retain and enforce the rights and privileges granted to it by the other terms of the franchise.”

There was no question involved as to whether the County Commissioners had a right to grant a franchise on the Montgomery Road within the village. There was no suggestion that the Montgomery Road within the village was a county road under the control of the County Commissioners. The decision of the Supreme Court of Ohio in the case of *Commissioners v. State*, 50 O. S., 653, referred to in appellant's reply brief, indicates that Montgomery Road was a county road in 1893, but it does not follow that it was such a county road in 1901, when the ordinance involved in the Interurban Railway case was passed. In any event such claim was not made or discussed in the case.

The only question before the court was whether, assuming that the village had granted a valid franchise to the Interurban Company, it had the power to include a provision which would affect fares beyond the village limits.

THE QUO WARRANTO JUDGMENT CONCLUSIVE.

The judgment of the Circuit Court of Hamilton County, affirmed by the Supreme Court in the *quo warranto* case is conclusive, and being in an action brought by the State, calling in question the rights of the company over the entire line—it is binding upon the city of Cincinnati, which is the mere creature of the State.

The City Solicitor asserts that the judgment in *quo warranto* is not a bar under the decision of the Supreme Court of Ohio in the case of *State, ex rel, v. The Cincinnati Gas Light & Coke Company*, 18 O. S., 263, 302. In making this contention the City Solicitor misapprehends the nature of the two kinds of proceeding in *quo warranto* authorized by the statutes of Ohio. The action in *quo warranto* in Ohio is governed entirely by the provisions of Title VIII, Chapter 1, Sections 12303 to 12344, inclusive. Section 12304 authorizes the bringing of an action in *quo warranto* against a corporation "when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right, in contravention of law." This action may under Section 12305 be brought either by the Attorney-General of the State or by a Prosecuting Attorney, and either by direction of the Governor, the Supreme Court, or the General Assembly, or upon the belief on the part of the Attorney-General or a Prosecuting Attorney that good reasons exist for bringing the action. The action so brought is a public action on relation of a public officer, and for the purpose of asserting a public right against a usurper. Such an action was that of *The State of Ohio on relation of Harry M. Hoffheimer, Prosecuting Attorney of Hamilton County, v. The*

Millcreek Valley Street Railway Company et al, discussed at length *supra*. The right asserted was strictly the public one to have public roads unincumbered by unauthorized occupancy by tracks and street cars. The powers of the Attorney-General and of the Prosecuting Attorney to bring such action were equal and a judgment in the proceeding would necessarily have the same effect whether the action were brought on the relation of the one or the other of these public officers. As the action was brought on the relation of the Prosecuting Attorney for the assertion of a public right against a claimed usurpation the judgment necessarily determined the question of usurpation against the State and in favor of the defendant. That conclusion is binding upon the State and all of its governmental subdivisions and agencies. Control by the City of Cincinnati over public roads within the present territory of the City is a delegated exercise by the municipality of a governmental function of the State and the authority of the City with respect to these roads is dependent upon and subordinate to that of the State. Its rights, therefore, are no greater than those of the State, and a determination of the rights of the company as against the State is necessarily determinative as against the municipality.

The case referred to by the City Solicitor, *State, ex rel, v. The Cincinnati Gas Light & Coke Company*, contains in the fourth proposition of the syllabus and in the opinion, at page 302, the statement of an entirely different situation and one which affords no authority for the contention of the City Solicitor that the judgment in the case of *State, ex rel Hoffheimer, v. The Millcreek Valley Street Railway Company* is not a bar. It was held by the Supreme Court in the case cited by the City Solicitor

that a judgment in favor of the defendant rendered in a *quo warranto* proceeding filed by a Prosecuting Attorney, upon an individual relation, was not a bar to subsequent proceeding in his public capacity. This holding is manifestly correct. A proceeding in which the Prosecuting Attorney acts in behalf of a private relator is one in which a private right of that relator is asserted against a defendant, and the adjudication determines nothing save the rights between the relator and the defendant.

The statutes of Ohio clearly recognize the distinction and provide different procedure for actions by the State's attorneys in the assertion of public rights and those other actions prosecuted on the relations of a private individual. In the latter class of cases the officer has not even authority to proceed without leave of court; see Section 12306. This class of action is one in which the name and authority of the State is sought to be used for the assertion of a private right only and it is hedged about with conditions and its determination is subject to restrictions which are not provided for and have no place in strictly public actions in *quo warranto* brought by the State's attorneys on their own relation and in the interests of the State.

The case of *State, ex rel Pontius, v. Northern Ohio Traction & Light Co.*, decided by the Supreme Court of Ohio on October 19, 1915, and to which more extended reference will be made hereafter, does not throw any light upon this subject, for while the Supreme Court of Ohio in a *quo warranto* proceeding filed in that court ignored a *quo warranto* proceeding previously filed and determined in the Circuit Court, involving the same grant, it does not give in its opinion the theory or grounds of such action.

It seems to us, however, that the contention of the City Solicitor, on either of the cases cited could go no farther than that one *quo warranto* proceeding is not a bar to a subsequent *quo warranto* proceeding. That claim, if sound, would not be applicable to the case at bar, which is not a *quo warranto* proceeding.

Assuming for purposes of argument that the State of Ohio would now have the right, by *quo warranto* proceedings to re-try the issues made and adjudicated in the case of *State, ex rel Hoffheimer, v. Millcreek Valley Street Railway Co.*, it does not follow that the City of Cincinnati can ignore the judgment in that case. On the contrary, even if that judgment, or any part of it, were subject to overturn by a later *quo warranto* proceeding, brought on behalf of the State, the City of Cincinnati would nevertheless be bound by the judgment until such overturn were accomplished in a subsequent *quo warranto* proceeding.

We submit, therefore that the ownership by plaintiffs of an independent grant by the County Commissioners on Carthage Pike to Gas Hall in Carthage is not open to question in this case. The only question remaining is the duration of said grant, considered as a grant by the County Commissioners.

THE COMMISSIONERS' GRANT IS PERPETUAL.

The County Commissioners not only had control of the road, but under Sections 3441 and 3443 had the express power to fix the terms and conditions for the construction of railways on public roads.

The grant of March 23, 1889, by the Commissioners, being without limitation as to time, is perpetual.

This contention is supported by numerous decisions of this court.

In *Louisville v. Cumberland Telephone Co.*, 224 U. S., 649, the court said on pages 663-664:

“In considering the duration of such a franchise it is necessary to consider that a telephone system can not be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State’s purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter can not be supported, either from a practical or technical standpoint.

“This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Tele-

phone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations. *Milhau v. Sharp*, 27 N. Y., 611 (1863); *Hudson Telephone Co. v. Jersey City*, 49 N. J. L., 303; *Mobile v. L. & N. R. R.*, 84 Alabama, 122; *Seattle v. Columbia & P. S. R. R.*, 6 Washington, 379, 392; *People v. Deehan*, 153 N. Y., 528. The earlier cases are reviewed in *Detroit St. R. R. v. Detroit*, 64 Fed. Rep., 628, 634, which was cited with approval in *Detroit v. Detroit St. R. R.*, 184 U. S., 368, 395, this court there saying that 'Where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee.' "

In the case of *Owensboro v. Cumberland Telephone Co.*, 230 U. S., 58, this court said (pp. 65-66) :

"The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant. *Detroit v. Detroit Street Railway*, *supra*; *Louisville v. Telephone Co.*, *supra*; *People v. O'Brien*, 111 N. Y., 1, 42; *Woodhaven Gas Light Co. v. Deehan*, 153 N. Y., 528; *Mobile v. L. & N. Railroad Co.*, 84 Alabama, 115; *Town of Arcata v. Arcata Rail-*

road Co., 92 California, 639; *Hudson Tel. Co. v. Jersey City*, 49 N. J. L., 303; *Dillon Mun. Corp.*, 5th Ed., Section 1265; *Nebraska Telephone Co. v. Fremont*, 72 Nebraska, 25, 29; *Plattsmouth v. Nebraska Tel. Co.*, 80 Nebraska, 460, 466. If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditures made, the right can not be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People v. O'Brien*, *supra*, a decision accepted and approved by this court in *Detroit v. Detroit Street Railway*, *supra*—‘The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly, when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts

that the right created by the grant of the franchise was perpetual, and not for a limited term only.' *Dillon on Mun. Corp.*, 5th Ed., Section 1265."

While there was a dissenting opinion in the case just quoted it was not upon the doctrine involved in the foregoing quotation but was based upon a power of repeal, which was to be found in Section 10 of the charter of the City of Owensboro, which is as follows:

"The common council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, amend, and repeal all ordinances for the following purposes, to-wit."

With reference to this section the dissenting opinion said:

"In other words the authority granted to regulate the streets is limited by the express reservation that it shall be exercised subject to the power of the city to amend and repeal any ordinance so enacted."

No such reservation of a power of repeal is claimed in the case at bar.

The doctrine for which we contend was also approved by this court in the case of *Boise Water Co. v. Boise City*, 230 U. S., 84, and *Old Colony Trust Co. v. Omaha*, 230 U. S., 100.

THE OHIO DECISIONS.

Prior to the time of the grant now under discussion the Supreme Court of Ohio had held in *The Junction Railroad Co. v. Ruggles*, 7 O. S., 1, that (syll. 1):

“Where a land owner granted a right-of-way to a railroad company organized under a charter in perpetuity, and the grant contains no limit as to time, the easement will be perpetual, unless terminated by release or abandonment.”

The same rule of construction would, in the absence of constitutional or statutory obstacles, apply to a public grant which is “a typical easement in property.” (Lurton, J., in *Louisville Trust Co. v. City of Cincinnati*, 76 F., on page 299; *Boise Water Co. v. Boise City*, 230 U. S., on page 91.)

The United States Circuit Court of Appeals for the 6th Circuit had occasion to interpret the law of Ohio on this subject in 1895, in the case of *Louisville Trust Co. v. City of Cincinnati*, 76 Fed., 296, the very litigation in which the franchise under consideration was sold at judicial sale, the opinion of the court being given prior to said sale.

There was a portion of the road within the City of Cincinnati which rested upon a franchise silent as to time, and the court, by Judge Lurton, held that it was not revocable by the City. The court said (p. 315):

“The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city to grant an unlimited street easement to either a railroad or street-car company, having the requisite franchises from the state. The act limiting the power of a city to a term not exceeding 25 years was not passed until May 14, 1878. Neither do we think there was any implied restriction upon the power of the city, springing from reasons of public policy. The corporation to which this grant was made

was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets."

East Ohio Gas Company v. City of Akron, 81 O. S., 33 [1909], cited by appellant, is not in point. The original ordinance in that case, passed September 26, 1898, was silent as to time, but fixed the price of gas for a period of ten years, being the longest period for which under the statute prices could be fixed (G. C., 3983). After the expiration of the ten years Council passed another ordinance fixing the price of gas for another period of ten years at a reduced rate. The gas company declined to accept the terms and signified its intention of discontinuing business and removing its pipes. Thereupon the city brought a suit to enjoin. The Supreme Court of Ohio, in sustaining the right of the company to withdraw, said at page 53:

"The contract being silent as to the duration of the franchise and the ten-year agreement as to the price of gas having expired, the city may, under its power of regulation, impose new conditions as to price and the gas company may accept or reject these. If the refusal to comply is final, the company necessarily incurs the penalty of forfeiture of its franchise to serve the people of the city."

The statutes of Ohio provide that the municipal council "may regulate from time to time the prices which such companies (gas, water and electricity) may charge," and that they "shall in no event charge more * * *

than the price fixed by the ordinance of Council" (G. C., 3982) and that neglect to furnish gas in accordance with the prices so fixed by Council shall forfeit all rights of the company (G. C., 3986).

State, ex rel Pontius, v. Northern Ohio Traction & Light Company, 93 O. S., 466 (1915), was decided by a divided court without opinion, upon the authority of the Akron case, as appears from the following judgment which is the only indication of the grounds for the decision by the majority:

"This cause came on to be heard on the pleadings and stipulations of the parties and was argued by counsel. On consideration whereof, the court finds upon the issues joined in favor of the plaintiff on the authority of *Gas Company v. The City of Akron*, 81 Ohio St., 33."

The case is pending in this court on writ of error (No. 313, October Term, 1916). The record, which shows that the county commissioners revoked a grant which was silent both as to rates and time, contains an opinion filed by the dissenting judges which shows that they dissented on the ground that the county commissioners were without authority under the Constitution and laws of Ohio to *revoke* their grant; but no such question is involved in this case. The county commissioners have not undertaken to revoke their grant.

Even if the effect of the decision of the Supreme Court of Ohio, were as claimed by counsel for the city, that a grant by the commissioners silent as to time is revocable by the commissioners, such decision would not be applicable in the case at bar, because:

(a) The county commissioners have never undertaken to revoke the grant in the case at bar; and

(b) The decision of the Supreme Court of Ohio was handed down many years after the grant in the case at bar and the vesting of the rights thereunder. This court will, therefore, decide for itself, in accordance with its own rulings and the earlier decision in *Junction Railroad v. Ruggles*, *supra*, the effect of the grant, especially as it was not even intimated by the Supreme Court in either the Akron case or the Northern Ohio Traction case that there was any constitutional or statutory obstacle to an irrevocable grant by the county commissioners.

In the case of *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S., 683, the question involved was whether the State of Kentucky had the right to repeal the charter of the Louisville Gas Co. which contended that such legislative charter "plainly expressed" the intent that it should not be subject to repeal. The existence of such plain expression of intent was the test of the right of repeal under the State statute. This court said (p. 697):

"The judges of the State court all concurred in the opinion that no such intent was plainly expressed. As this question is at the very foundation of the inquiry whether the defendant had a valid contract with the State, the obligation of which has been impaired by subsequent legislation, we can not avoid its determination. Whether an alleged contract arises from State legislation, or by agreement with the agents of a State, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the State court, to decide whether there exists a contract within the protection of the Constitution of the United States. *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Wright v. Nagle*, 101 U. S., 791, 794; *Louisville*

& *Nashville Railroad v. Palmes*, 109 U. S., 254, 257. After carefully considering the grounds upon which the State court rests its conclusion, we have felt constrained to reach a different result."

This doctrine was reaffirmed in *Douglas v. Kentucky*, 168 U. S., 488, 502; *Stearns v. Minnesota*, 179 U. S., 223, 233, and in numerous other decisions of this court, among others, *Grand Trunk Western Ry. Co. v. South Bend*, 227 U. S., 544.

Even in cases where the jurisdiction of the Federal Court rests upon diverse citizenship the same rule prevails.

The subject is discussed very fully by Judge Lurton in the case to which we have frequently referred, *Louisville Trust Co. v. City of Cincinnati*, 76 F., 296.

In *Burgess v. Seligman*, 107 U. S., 20, this court said (pp. 33-34):

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administra-

tion of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or *when there has been no decision, of the State tribunals*, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt." [Italics ours.]

This court held the mechanic's lien law of Ohio to be constitutional under the Ohio Constitution after the Supreme Court of Ohio had held it to be unconstitutional. *Great Southern Fire Proof Hotel v. Jones*, 193 U. S., 532. This court exercised its own judgment on that question because the rights of the parties in the case had accrued before the decision by the State Supreme Court.

Of course it has been held that in the latter class of cases "the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt," but we submit that the question here involved is not, under the decisions of this court, "balanced with doubt."

The claim of the City Solicitor as to the effect of the two decisions of the Supreme Court of Ohio above referred to is that they establish the doctrine that a franchise, silent as to time, is revocable at the will of the grantor. Such a claim is contrary to the rule which is well established in this court, and in practically all other courts where it has ever been considered. The established rule is dictated by good morals and common sense. As this court said in *Louisville v. Cumberland Telephone Co.*, *supra* (663):

"For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter can not be supported, either from a practical or technical standpoint."

And in *Owensboro v. Cumberland Telephone Co.*, *supra*, the court said on page 66, that the rule is based upon the "plainest principles of justice and right."

In *People v. O'Brien*, 111 N. Y., 1 (cited with approval by this court in *Detroit v. Detroit St. Ry. Co.* and *Owensboro v. Cumberland Tel. Co.*, *supra*), the New York Court of Appeals said, in speaking of the claim that a grant silent as to time is revocable at the will of the State, "We believe this proposition to be not only repugnant to jus-

tice and reason, but contrary to the uniform course of authority in this country."

In *Hudson Telephone Co. v. Jersey City*, 49 N. J. L., 303 (cited with approval in the case of *Owensboro v. Cumberland Telephone Co.*), the court said on page 305:

"The notion that a corporation which, under provisions similar to the present act, has upon the strength of the permission to use a certain route spent thousands of dollars in laying railway tracks or subterranean cables or in erecting posts and stretching wires, is at the mercy of the City authorities continually and entirely, is not to be entertained for a moment."

THE GRANT NOT LIMITED BY STATUTE.

The City Solicitor claims that Section 2502, Revised Statutes, limits the duration of such grant to twenty-five years, but an examination of that section will show it refers solely to grants by municipal councils. Grants by County Commissioners are provided for and governed by wholly different sections of the Revised Statutes, to-wit, Sections 3441 and 3443.

Section 3439, which incorporated by reference certain municipal statutes, originally included 2502 in such reference, but in 1883, by amendment, 2502 was expressly excluded, so that the form of this statute on March 23, 1889, when the Commissioners' grant involved in this case was made, was as follows:

"Sec. 3439. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street

or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of Section 2501 and of 2503 to 2505, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old, or the granting of a new route; provided, that this act shall not apply to any county containing a city of the second grade of the second class."

It remained in the foregoing form until amended by act passed April 9, 1908 (99 O. L., 103), which omitted the closing proviso excluding from its operation any county containing a city of the second grade of the second class, but leaving the express elimination of 2502.

In the recent recodification of the Ohio Statutes (Feb. 14, 1910), the section was again amended and became Sections 9105 and 9106 of the General Code of Ohio, which make *no* reference to any of the municipal sections 2501 *et seq.*

Since 1883, therefore, there has never been, and there is not now, any statute of Ohio which places a time limit upon grants by County Commissioners over public highways under their control. The legislative policy of the State leaves the Commissioners free to exercise their discretion in this regard.

AMENDMENT OF 1883 TO SECTION 3439 WAS NOT UNCONSTITUTIONAL.

It is claimed in the brief of counsel for the City that the amendment of April 18, 1883, to Section 3439, eliminating Section 2502 therefrom, was unconstitutional, because it excepted from its operation "any county containing a city of the second grade of the second class."

But legislation of that character was constantly upheld by the Supreme Court of Ohio long prior to the grant of the County Commissioners of March 23, 1889, and thereafter, up to the decision in the case of *Hixson v. Burson*, 54 O. S., 470, decided April 28, 1896, when the Supreme Court of Ohio overruled its former rulings upon that point. It has been accordingly held that contracts made under the authority of such special legislation prior to the time of such reversal (April 28, 1896) will be upheld in spite of the fact that after said date legislation of that character has been held to be invalid.

This is true as to classification of either counties or cities.

In *Board of Commissioners of Franklin County v. Cardiner Savings Institution*, 119 Federal, 36, the Circuit Court of Appeals for the Sixth Circuit, composed of Judges Lurton, Day and Severens, decided that bonds issued under an act of the Ohio Legislature relating only to counties containing cities of the first grade of the second class (Franklin County), said bonds being issued prior to the decision in *Hixson v. Burson*, were valid bonds, although the legislation in question was clearly unconstitutional since the decision in *Hixson v. Burson*. The Court by Judge, now Mr. Justice Day, said:

“It is claimed that the act under which the bonds were issued is unconstitutional, as being in contravention of Article XXVI (Article II, Section 26) of the Constitution of Ohio, which provides that all laws of a general nature shall have a uniform operation throughout the state. Since the decision in *Hixson v. Burson*, 54 Ohio St., 470; 43 N. E., 1000, there can be no question as to this law falling within the category of those condemned as attempts to enact special

legislation, when general laws having a uniform operation throughout the state can only be passed. *Hixson v. Burson* expressly overruled the prior decision of the Ohio Supreme Court in *State v. Board of Franklin Co. Com'rs*, 35 Ohio St., 459, holding legislation of the character of that now under consideration to be valid. The latter decision was the declared law of the state when these bonds were issued. As late as *Wilkes Co. v. Coler*, 180 U. S., 506, 21 Sup. Ct., 458, 45 L. Ed., 642, Mr. Justice Harlan, speaking for the Supreme Court, said:

“ ‘It is a settled doctrine in this court that the question arising in a suit in a federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and that the rights and obligations of parties accruing under such a state of law would not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation. *Loeb v. Trustees*, 179 U. S., 472, 21 Sup. Ct., 174, 45 L. Ed., 280, and authorities there cited.’

“ ‘Up to the time of the issue of these bonds, acts similar to the one under consideration had been upheld by the Supreme Court of Ohio. The fact that the plaintiffs below purchased the bonds after the decision in *Hixson v. Burson* can not affect its title as a *bona fide* holder if the bonds were issued under a law held to be valid at the time of the issue. *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S., 255, 19 Sup. Ct., 390, 43 L. Ed., 689.’”

A similar ruling was made by the same court in the case of *Rees v. Olmsted*, 135 Federal, 296, where the

history of special legislation in Ohio and its overturn about the year 1896 is set forth fully.

The same view is taken by the Supreme Court of Ohio in *Thomas v. State*, 76 O. S., 341, where the court said that (p. 360)—

“the interpretation which is placed upon a constitutional provision by the highest tribunal appointed for that purpose is to be regarded as a part of the provision. In numerous authoritative and well-considered cases this doctrine has been stated in varying terms but to the same import.”

The court referred (p. 361) to an earlier case as recognizing and applying the doctrine “in support of the binding obligation of contracts executed under favor of legislation which this court had previously held to be constitutionally valid, although in the case cited it was admitted to be void under our later decisions.”

As late as February 5, 1895, the Supreme Court of Ohio upheld an act of the General Assembly providing for the appointment of jury commissioners in the counties of the state, but excluding certain specific counties.

State v. Kendle, 52 O. S., 346.

State of Ohio, ex rel Herman, city solicitor of Dayton, Ohio, v. The Oakwood Street Railway Company, 11 Circuit Court (New Series), 263, was a proceeding in *quo warranto* to oust the defendant from its street railway franchise in the city of Dayton, which had been granted July 10, 1891, for fifty years under Section 2502 as amended April 24, 1891. This amendment provided that “no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a

greater period than twenty-five years from the date of such grant or renewal, except in cities of the second grade of the second class, in which no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than fifty years from the date of such grant or renewal." Dayton was the only city in the State "of the second grade of the second class." The relator claimed that the amendment was unconstitutional as special legislation and the franchise invalid.

The action was brought in 1908 when such special legislation was clearly unconstitutional under decisions subsequent to the passage of the amendment and the grant of the franchise.

But the court held that as the legislation was constitutional when passed, and the grant valid when made, the subsequent decisions on special legislation could not invalidate it. The court said, p. 270:

"So that if, in view of adjudications since the amendment to Section 2502, April, 1891, the section is probably unconstitutional, yet as similar laws, including the same or similar constitutional defects, had been judicially determined valid theretofore, and at the time of the grant to the railway company, the subsequent adjudications could not have a retroactive effect upon the grant, because it is a contract founded upon a good consideration. *Shoemaker v. City of Cincinnati*, 68 O. S., 603."

The opinion of the Circuit Court contains a very full discussion of the subject, and its judgment was affirmed by the Supreme Court of Ohio, without report, 81 O. S., 502.

The decision of the Circuit Court of Logan County in *C., C. & St. L. Ry. v. Urbana, B. & N. Ry. Co.*, quoted in the "Appendix" to brief of appellant, p. 28, to the effect that the amendment of 1883 to Section 3439 was unconstitutional as special legislation, relates to grants made in 1901 and 1902, after the decision of the Supreme Court in *Hixson v. Burson* (1896), and is not therefore in conflict with the doctrine of *State ex rel v. Oakwood St. Ry. Co.*, *supra*.

SECTION 3438 DOES NOT APPLY 2502 TO COMMISSIONERS'
GRANTS.

On the first oral argument of the present case the City Solicitor also claimed that the amendment of Section 3439 in April, 1883, which eliminated Section 2502 from that section, merely transferred it to Section 3438, where it would have the same effect as to the Commissioners' grant.

The language referred to is as follows (Section 3438, Appendix I):

"except however, in granting permission to extend existing routes *in cities of the first, second and third grades of the first class, and first grade, second class*, such cities, and the companies owning such route, shall have the same rights and powers they have under the laws and contracts now existing; and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of *such city*, except as a new route, and subject to the provisions of Sec-

tions two thousand five hundred and one and two thousand five hundred and two."

It is apparent that the language quoted refers only to cities of the grades there specified and does not include villages, such as Carthage. Also that it refers solely to what is known as an "extension," which has a technical meaning in Ohio and differs from an independent grant, such as the Commissioners' grant of March 23, 1889, here under discussion.

The contention of the City Solicitor in this regard is, therefore, not supported by the statute, and such contention was never made at any stage of the case, in briefs or otherwise, until the closing argument of the City Solicitor.

3. MAIN STREET AND LOCKLAND AVENUE FROM GAS HALL TO THE NORTHERN BOUNDARY OF CARTHAGE.

The right of appellees over this section of the line is based upon the ordinance of the Village of Carthage of August 7, 1894 (p. 17).

This part of the line was set up, adjudicated and sold in the proceedings in the federal court heretofore referred to.

Its validity was adjudicated in the case of *The Millcreek Valley St. Ry. Co. v. Village of Carthage* (p. 109 *et seq.*).

Also adjudicated in *State of Ohio, ex rel Hoffheimer v. Millcreek Valley St. Ry. Co.* (pp. 179, 181, 195).

The grant in question was without limit as to time, and does not expire before the end of 25 years, namely, August 7, 1919.

It was an extension of an existing line, and did not require public bidding. *Isom v. Railway Co.*, 10 Ohio Cir. Ct. Rep. (New Series), 89, 99. The right of the village to grant an extension of an existing line under R. S., 2505, is not limited to an existing line authorized by the village. The reason and language of the statute apply to any existing line *within* a municipality, whether authorized by the municipality itself or by any other legal authority. If, for instance, a city annexes territory in which there is an existing street railway line, it may thereafter under 2505 authorize extensions thereof, although such original line was not its own creation. *Bell v. City of Glenville et al.*, 5 Ohio Cir. Ct. Rep. (New Series), 461. Affirmed without report by Supreme Court, 73 O. S., 392; 75 O. S., 574.

There is no valid theory upon which the grant in question has now expired or can expire before August, 1919. The theory of the City Solicitor that it expired March 19, 1914, is based upon the City's contention that the plaintiff's right to operate their main line in Carthage expired on that date, which, as we have seen, is erroneous.

4. WAYNE AVENUE IN HARTWELL.

Plaintiff's rights on this section of the line are founded on the grant of the Village of Hartwell dated September 16, 1896 (Rec., 19). There can be no question that this is an original grant by the village and not a mere extension of the Carthage franchise as claimed by the city. The records of Hartwell in evidence show that the application for the right to construct this line was duly made by the company; that public notice thereof was duly advertised by the clerk of the village under orders of the

Council (Rec., 268-270), all as provided in Sections 2501 and 2502, and that thereafter the grant of September 16, 1896, was made. The records further show that the Council considered the very question as to whether this grant should be made without complying with the requirements of Sections 2501 and 2502 and under the advice of the Village Solicitor the Council determined that all of the formalities required by these sections should be complied with (Rec., 54-55-56). It is true that competitive bids were not shown, but it is not claimed that there is any requirement in the statute that there be more than one bidder. The statute does not require that a record of bids shall be kept and entered on the minutes any more than it requires that a record of the consents of property owners be preserved and entered on the minutes. It is not claimed that it is incumbent upon the company to show that consents of property owners which are a prerequisite of the validity of any street railway grant were given as there is a presumption from the making of the grant that such formalities were complied with. This has been expressly decided in the case of *Ireton Brothers v. Traction Co.*, 2 N.P.(N.S.), page 317, and in *State v. Street Railway Company*, *supra*, 11 C.C.(N.S.), page 263, where the Court said on page 268:

“It is claimed by the relator that the ordinance was not published as required by the statute, and for that reason it is void. It was not incumbent upon the railway company to discharge this duty; it was upon the city. It seeks now to avail itself, to the prejudice of the company, of its own omission. Being incumbent upon the city, the burden of establishing this omission is upon it. We are of the opinion it has not discharged it; and in the absence of tes-

timony on the point the presumption is that the ordinance was published.

"The relator claims there is no proof of consents. Whether any were given as to the extension should not avail the city here, as that is a matter of the abutting land owners alone, and no one of that class is here complaining. The lapse of so many years after the extension was granted, without protest, we are inclined to the view that in law it constitutes a waiver."

The judgment in that case was affirmed by the Supreme Court of Ohio without report. (81 O. S., page 502.)

These cases decide that the burden of proof to show that such formalities were not complied with is upon the party making such assertion. The city has not attempted to sustain this burden of proof and it is significant that Louis B. Sawyer, who was Village Solicitor of Hartwell at the time this grant was made, was called as a witness by the city (Rec., 62) and was not even asked as to competitive bids, although counsel for the city did not overlook asking this very question of the next witness, Mr. Hammel (Rec., 64), as to the same formalities in Carthage.

This grant of 1896 although silent as to time is valid for 25 years after its date, until 1921.

Boise Water Co. v. Boise City, 230 U. S., 84, p. 92.

Somers v. Cincinnati, 6 Dec. R., 887; 8 Am. Law Rec., 612, 621.

5. RURAL AND DeCAMP AVENUES IN HARTWELL.

The rights of appellees upon these avenues are based upon the ordinance of May 14, 1900, which is a mere ex-

tension ordinance and did not require advertisement (Rec., p. 22). This appears from its title, as follows:

“Ordinance No. 679 granting to The Millcreek Valley Street Railway Company an extension of its present street railroad route in the Village of Hartwell. * * *.”

The recitals show that the company made application in writing to extend its present street railroad line in Wayne avenue, that written consents of the property owners were obtained and that “in the opinion of council said extension of said route will be a public convenience and benefit to the property affected thereby,” which are almost the identical words prescribed by the statute in the case of extensions. This grant is silent as to time, but no theory has been advanced upon which it can be claimed that it has now expired. It can not expire at the earliest until September 16, 1921, the date of the expiration of the original grant of September 16, 1896. By ordinance of April 1, 1901, an extension was granted over Rural Avenue upon the conditions and for the period of the ordinance of May 14, 1900 (Rec., 271).

6. SPRINGFIELD TURNPIKE.

Appellees' title to their line upon Springfield Pike is based upon (a) a grant from the company owning the pike dated March 19, 1895 (Rec., 260), which is perpetual in terms; and (b) a grant from the Board of County Commissioners of Hamilton County for the specific period of 25 years, dated March 14, 1900 (Rec., 263, 266), and conferring a right to operate over said pike all the way to the north line of Hamilton County.

The evidence shows that the portion of the Springfield Pike in question was surrendered to the county in 1897 (Rec., 56, 272). Its control thereof follows as a matter of law and it appears from the evidence that at the time of the trial of the case at bar the County Commissioners were engaged in the repair of said turnpike for its entire width at this point (Rec., 58).

A witness testified that the corporation line of Hartwell extended to the middle of said turnpike but admits (Rec., 62), that his testimony was based solely upon a plat, a tracing of which with all endorsements thereon was put in evidence. We submit that said plat does not show the fact claimed by the City, namely, that the boundary line of Hartwell extends to the middle of the turnpike.

A village could be created and its boundaries be established in only one way, namely, by proceedings before the County Commissioners (Rev. Stat., Sections 1553-1571).

Under Section 1553 a preliminary requirement was the recording of a plat duly acknowledged or certified as to its correctness by the oath of an engineer or surveyor (Section 1553). Thereafter a formal application must be filed by petition signed by not less than thirty electors, containing, among other things, an accurate description of the territory. Notice by publication for six consecutive weeks was required, followed by a hearing before the Commissioners and a formal order by the Commissioners, all of which were to be entered on the journal of the Commissioners and filed with the Recorder.

A tracing of the plat relied upon by the City and introduced in evidence appears opposite page 270 of the Record. It does not contain any acknowledgment or certificate, and even if it did it would not establish the

boundaries of Hartwell, without a showing that the necessary proceedings were taken before the County Commissioners and the boundaries established by their formal order. The City did not attempt in this case to show any of the formal proceedings so required by the statute.

It can not be claimed that the mere filing of this unacknowledged and uncertified plat had the effect of depriving the private corporation which then owned this turnpike, of its right of ownership and control over any part thereof.

APPELLEES HAVE GOOD TITLE OVER ENTIRE LINE.

We submit we have shown that appellees have a good title to every part of the street railway line covered by this ordinance, but we again urge upon the court that the question here is not whether there is one bad link, but whether there is one good link, because if there is a good link the ordinance impairs the obligation of the grant or contract upon which it rests.

EXPENDITURES ON FAITH OF GRANTS.

It appears from the evidence of Mr. Draper (Rec., 68), that several hundred thousands of dollars have been spent upon the line in question by appellee, the Ohio Traction Company, since its lease in 1902, in addition to the sums spent by the owners in the original construction of the line.

JURISDICTION.

Appellant contends that the District Court had no jurisdiction for the reason that Section 5 of the ordi-

nance complained of authorizes the City Solicitor to take legal proceedings to enforce the ordinance and that therefore this suit was one to enjoin proceedings against an action in a State court and in contravention of Section 720 of the United States Revised Statutes.

It is true that Section 5 of the ordinance authorizes the City Solicitor to take such legal proceedings as may be proper and necessary, etc., but the City did not by such a provision denude itself of its power to enforce the ordinance through the police department, or by any other means at hand.

Furthermore, the ordinance declared the company to be a trespasser upon the streets from the date of its taking effect, and authorized it to operate only upon the conditions set forth in the ordinance itself, namely—

(a) A reduced fare.

(b) Transfers to lines owned by a separate and distinct company, not a party to the ordinance or to this suit.

(c) The acceptance of the terms of the ordinance.

It was immaterial, therefore, whether the City Solicitor should ever take proceedings under Section 5 of the ordinance to enforce its provisions, as the ordinance was in form self-executing. On the day that it took effect, the company, if it undertook to run its cars, would be exposed to controversies or altercations with passengers as to fares and transfers and would be further exposed to the claim on the part of the city that by operating its cars it had accepted the terms of the ordinance, including an abandonment of its rights and an acquiescence in the day to day license.

The ordinance was clearly, therefore, a direct, self-executing impairment of appellee's rights.

The danger of controversies with passengers over fares was sufficient to justify an injunction. In *Detroit v. Detroit Street Railway Company*, 184 U. S., 368, this court said, on page 379:

“Of course, if the complainant obey these ordinances no controversy can arise, but if in good faith, it believes them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of non-payment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.”

See also to the same effect *Cleveland v. Cleveland Street Ry. Co.*, 194 U. S., 517, on page 531.

The ordinance was also a direct impairment as a cloud upon the title of appellees.

In view of the impairment accomplished by the ordinance itself, or authorized by it in other ways than by a

mere action at law, the District Court had jurisdiction to enjoin its enforcement by any means, even including an action at law.

The prayer of the bill was for an injunction against any enforcement of the act (R., 6) and the decree was in similar general terms (R., 46).

Counsel for the City cites the case of *Louisville Trust Co. v. City of Cincinnati*, 76 Fed., 296, the opinion being by Judge Lurton and concurred in by Judges Taft and Hammond, containing this sentence,

“The remedy by injunction against proceedings in a State court is not permitted under the act of Congress.”

In that case the State court had acquired jurisdiction of the subject-matter of the litigation and the case had proceeded to final decree before the action was brought in the Federal court. The Circuit Court of Appeals held, however, that it was proper to enjoin the City from taking into its own hands the enforcement of the decree of the State court.

There should be read in connection with that case the later decision by the same court in the case of *Iron Mountain R. Co. v. City of Memphis*, 96 Fed., 113, in which the decision was by Judge Taft, concurred in by Judges Lurton and Clark.

The railroad company having a franchise on one of the streets of the City of Memphis, the City passed an ordinance declaring such franchise to be forfeited. The questions discussed and conclusions reached appear sufficiently in the following quotation from the opinion by Judge Taft:

“We come now, however, to a much more difficult question, which arises on the appeal of the

complainant below, the railroad company. The Court below held that there was no jurisdiction under the bill, except that which arose out of the threatened taking possession of the street, and ousting the railroad company therefrom by force, without due process of law. It enjoined the city only from taking forcible possession of the street. This injunction might properly have been founded on the relative situations of the parties as they were admitted to be. The fact that the railroad company was in possession of the street, gained lawfully, and that the city could not rightly enforce a forfeiture without judicial proceedings, was a sufficient ground for granting the injunction which the Court below granted; and it became immaterial, therefore, in furnishing this remedy, whether the railroad company had violated a condition forfeiting its estate. If the threatened use of the police to enforce the resolution of forfeiture was essential to the federal jurisdiction, then it would seem that the order of the Court below disposed of the entire controversy before it. If, however, the resolution of the legislative council was a law of the State regulating interstate commerce, or was a law of the State impairing the obligation of contracts, or depriving a person of its property without due process of law, then the complainant could invoke the jurisdiction of the Court below to enjoin its enforcement, *without regard to the method by which it was proposed to carry it into effect.* * * *

“It impairs the obligation of a contract if it purports *by force of law to authorize* any one to do that which would be a breach of the contract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and

right of possession in the city, it authorizes the city officers peaceably to take possession of the street, and to take up the tracks, and would *doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them.* * * *

“It is certainly a cloud upon the title of the railroad company in its occupancy of the street, which it may ask a court of equity to remove, and to enjoin any claim under it.” [Italics ours.]

The Circuit Court had enjoined the ousting of the railroad company by force but had not enjoined any judicial proceedings to enforce the forfeiture; thereupon the City filed its action in the State court for that purpose. A supplemental bill was tendered, alleging the filing of such suit and asking that its prosecution be enjoined. The Circuit Court refused to permit the bill to be filed and denied the prayer for a preliminary injunction. With reference to this subject the Circuit Court of Appeals said on page 131:

“We conclude, therefore, that the bill stated a good cause of action on the ground that the resolution of the city of March 25, 1898, impaired the obligation of the contract under which the railroad company occupied Kentucky avenue, if it be true, as averred in the bill, that no condition of the contract had been broken justifying forfeiture. This gave to the court below jurisdiction of the whole controversy between the city and the railroad company; and, inasmuch as the suit had been brought a considerable time before the State suits were brought it justified and required the court below to enjoin the suits in the State court as an impairment of its jurisdiction over the controversy

with which it had been invested by the filing of the bill. That such a remedy is not in conflict with Section 720 of the Revised Statutes forbidding the Federal Courts to issue injunctions against proceedings in a State Court, is abundantly established by authority. *French v. Hay*, 22 Wall., 250-253; *Dietzsch v. Huidekoper*, 103 U. S., 494-498; *Fisk v. Railroad Company*, 10 Blatchf., 518, 9 Fed. Cases, 167; *Union Mutual Life Insurance Company v. University of Chicago*, 6 Fed., 443; *Sharon v. Terry*, 36 Fed., 337; *Garner v. Bank*, 16 C. C. A., 86, 67 Fed., 833."

The cases cited in the brief of counsel for the City do not support the City's contention on this point.

In *Defiance Water Co. v. Defiance*, 191 U. S., 184, cited by appellant on page 12 of its brief, the bill did not set forth the resolution or ordinance complained of *in extenso* but when it appeared in the evidence the court was of the opinion that "clearly this resolution was not a law impairing the obligation of the contract." (p. 193.)

The first quotation on page 12 of appellant's brief from the opinion in that case follows immediately after the following sentence:

"In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction *and application* of the constitution and it is readily seen that cases in that predicament must be rare." [Italics ours.]

The Defiance case is not authority for the contention that where a city ordinance does impair the validity of an

existing contract the injured party must work out his rights through the state courts; on the contrary, the original jurisdiction of the United States Courts has been invoked and sustained under such state of facts in numerous cases, of which the following are typical—

Detroit v. Detroit Citizens St. Ry. Co., 184 U. S., 368.

Owensboro v. Cumberland Telephone Co., 230 U. S., 58.

Boise Water Co. v. Boise City, 230 U. S., 84.

Old Colony Trust Co. v. Omaha, 230 U. S., 100.

Mallinckrodt Works v. City of St. Louis (238 U. S., 41), syllabus 4.

Neither in this paragraph of the head note, or syllabus referred to, nor in the opinion in that case, do we find anything relating to this question.

In the brief of counsel for appellant is also cited upon the same proposition the case of

Minder v. Georgia (183 U. S., 559),

and a quotation is given from the opinion of Mr. Chief Justice Fuller, which is to the effect that the requirements of the fourteenth amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State, and if the laws operate on all persons alike, and do not subject the individual to the arbitrary exercise of the powers of government; and

Barney v. City of New York (193 U. S., 430),

is also cited to the same effect. Neither of these cases has any relation to the subject with reference to which they are cited.

In some stages of this case the City has denied federal jurisdiction on the authority of the case of *Seattle Elec-*

tric Co. v. Seattle, etc., R. Co., 185 Fed., 365. That case is fully disposed of, and in fact the whole subject of jurisdiction in this class of cases is fully settled, by the decision of this court in the case of *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S., 278. We refer the court to this case generally and quote particularly an extract from the opinion at page 293, the italics being our own:

“Finally the subject was elaborately considered in *Ex parte Young*, 209 U. S., 123. Without attempting to fully state the case, it suffices to say that although the proceeding was one in *habeas corpus*, the controversy in its ultimate aspect concerned the power of a federal court to prevent the enforcement of railroad rates fixed under state legislative authority which were confiscatory. In the course of an opinion reviewing the whole field it was said (page 155):

“ ‘The various authorities we have referred to furnish ample justification for the assertion that *individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action.*’ ”

ACTION NOT PREMATURE.

On page 12 of brief for the City, it is suggested that this action is premature, because, although the ordinance had been passed and signed by the Mayor, it could not

take effect for 30 days under the Initiative and Referendum law.

But the legislative action of the City was complete. There was nothing more for the City Council or the Mayor to do to make a complete ordinance. The filing of a referendum petition within 30 days would have put the ordinance to a popular vote but in the absence of any such petition the ordinance took effect at the end of the 30 days without any action by anybody.

The case of *Elkins v. City of Chicago*, 119 Fed., 957, cited by counsel, is not applicable because there the ordinance in question was one which simply adopted the report of a committee finding that a street railway franchise would expire at a certain future time, and recommending that the Council take measure to dispossess the company at the expiration of that time, unless there was a previous renewal.

The question is hardly of any importance, however, because the 30 days had expired without any referendum petition being filed and the ordinance therefore had gone into effect before the trial of this action in the District Court.

CONCLUSION.

We again call attention to the very thorough discussion of this case in the opinion of the court below (Rec., 29) and respectfully submit that the judgment of that court should be affirmed.

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APPENDIX I.

Sections 3437-3443 (Smith & Benedict's Revised Statutes of Ohio, Edition 1890), being the sections relating generally to street railways.

Section 3437. (Where street railways may be constructed.) Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation or unincorporated village; and offices, depots, and other necessary buildings for such railways may also be constructed. (67 v. 10, Section 1; S. & S., 135.)

Section 3438. (Who may grant authority to construct same; proviso.) The right so to construct or extend such railway within or beyond the limits of a municipal corporation can be granted only by the council thereof, by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village can be granted only by the county commissioners, by order entered on their journal; and after said grant or renewal of any grant shall have been made, whether by general or special ordinance, or by order of the county commissioners, neither the municipal corporation nor the county commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant or renewal of a grant during the term for which said grant or renewal shall have been made. Provided, that no authority shall be given by such municipal or county authorities, to occupy the track, whether single or double, or other structure, of any existing street railways for more than one eighth of the entire distance between the

termini of the route, as actually constructed, operated and run over, of the company or individual to whom such grant is made; except, however, in granting permission to extend existing routes in cities of the first, second and third grade of the first class, and first grade, second class, such cities, and the companies owning such route, shall have the same rights and powers they have under the laws and contracts now existing; and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of such city, except as a new route, and subject to the provisions of sections two thousand five hundred and one and two thousand five hundred and two. (1883, April 18; 86 v. 173, 174; Rev. Stat. 1880; 67 v. 10, Section 1.)

Section 3439. (Written consent of owners of more than one-half of feet front necessary.) No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of sections two thousand five hundred and one and of two thousand five hundred and three to two thousand five hundred and five, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route; provided, that this act shall not apply to any county containing a city of the second grade of the second class. (1883, April 18; 80 v. 173, 175; Rev. Stat., 1880; 65 v. 112, Section 3; S. & S., 139.)

Section 3440. (When property may be appropriated for such railways.) When the council or commissioners make such grant, the company or person to whom the grant is made may appropriate any property necessary therefor, when the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway. (63 v. 55, Section 4; 61 v. 53, Section 1; S. & S., 136; S. & S., 137.)

Section 3441. (The authority controlling the public road must consent.) If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied. (67 v. 10, Section 1.)

Section 3442. (Form of oath in appropriation proceedings.) In case of appropriation of property for such purpose, the oath to be administered to the jury shall be as follows: "You and each of you do solemnly swear that you will justly and impartially assess, according to your best judgment, the amount of compensation which is due to (here name the owner or owners), by reason of the appropriation of the street or avenue (as in the statement described), irrespective of any benefit from any improvement proposed by said (here name the company, individual, or company of individuals), and that you will in assessing any damages that may accrue to (here name the owner or owners), by reason of the appropriation, other than the compensation, further ascertain how much less valuable the lot or lots of said (here name the owner or owners), will be in consequence of such appropriation." And the jury, in ascertaining such compensation or dam-

ages, shall determine the amount thereof without reference to the distinction between a public and a private nuisance, and the effect of such distinction upon the right of such owner or owners to claim compensation or damages, and the court shall, if requested, so direct the jury. (63 v. 55, Section 5; S. & S., 138.)

Section 3443. (Council, etc., may fix terms and conditions.) Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated. (67 v. 10, Section 1; 66 v. 140, Section 1.)

Sections 2501-2505 (Smith & Benedict's Revised Statutes of Ohio, Edition 1890), being the sections relating to street railway grants by municipal corporations.

Section 2501. (Terms and conditions of construction and operation to be fixed by council; renewal of grant.) No corporation, individual or individuals, shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor; and cities of the first and second grade of the first class, and of the second grade of the second class may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest. (1887, March 4; 84 v. 40; Rev. Stat., 1880; 66 v. 217, Section 411; 76 v. 156, Section 4; S. & S., 137; S. & C., 1560.)

Section 2502. (Proceedings to establish a street railroad route; grant not valid for more than twenty-five

years.) Nothing mentioned in the next preceding section shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon the recommendation of the board of public works in cities having such a board, and of the board of improvements in other municipalities having such a board; and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given by the clerk of the corporation in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation for the period of a least three consecutive weeks; and no such grant as mentioned in said preceding section shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed; provided, that no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant. (1884, March 20; 81 v. 66; 80 v. 173; Rev. Stat., 1880; 67 v. 77, Section 412; 76 v. 156, Section 5; S. & C., 1560.)

Section 2503. (Grade of streets when street railroad is constructed.) Before any street railroad shall be constructed, on any street less than sixty feet in width, with a roadway of thirty-five feet, or under, the council shall provide, that the crown of the street shall be made a nearly flat uniform curve, from curb to curb, without ditch gutters, and in such manner as to give all wheeled vehicles the full use of the roadway up to the face of the curb, after the plan of the streets in the cities of Philadelphia and New York. And on any street, whenever the tracks of two street railroads, or of a street railroad and a steam railroad, cross each other at a convenient grade, the crossings shall be made with crossing-frogs of the most approved pattern and materials and kept up and in repair at the joint expense of the companies owning said tracks. (1881, April 20; 78 v. 296; Rev. Stat., 1880; 66 v. 217, Section 413; S. & S., 139.)

Section 2504. (Pavement of streets where railroads are constructed.) The council may require any part or all of the track between the rails of any street railroad, constructed within the corporate limits, to be paved with gravel, bowlders, or the Nicholson, or other wooden pavement, as may be deemed proper; but without the corporate limits, paving between the rails with bowlders or the Nicholson, or other wooden pavement shall not be required. (66 v. 217, Section 414; S. & S., 139.)

Section 2505. (Council of city or village may grant extension of street railroad.) The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections three thousand four hundred and thirty-seven, three thousand four hundred and thirty-eight, three thousand four hundred and

thirty-nine, three thousand four hundred and forty, three thousand four hundred and forty-one, three thousand four hundred and forty-two, and three thousand four hundred and forty-three, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation. (66 v. 140, Section 1; 1880, March 9; 77 v. 42, 43; Rev. Stat., 1880.)



APPENDIX II.

Decision of the Circuit Court of Hamilton County in the case of The Millcreek Valley Street Railway Company, a corporation, v. The Village of Carthage et al, 18 Ohio Circuit Court Reports, 216. Affirmed by Supreme Court of Ohio, without report, 62 Ohio State, 636.

Appeal from the Court of Common Pleas of Hamilton County.

VOORHEES, J.

It will be sufficient for the exposition of the law applicable to this case, to state the following facts:

The petition avers the corporate capacity of the plaintiff, its ownership and possession of the electric street railway, which passed through the defendant village. It recites the source of title to the railway property now vested in the plaintiff company; that the road was constructed, maintained and operated at great cost and expense upon the faith of certain acts of the defendant village, through its council and officers, who invited and induced the plaintiff's predecessor in title and occupancy, to construct in its streets said railroad, and who consented and acquiesced in the construction and operation of said railway at the time the same was built, and up to about July 1st, 1898.

About July 1st, 1898, the council of said village of Carthage, without authority of law, and without the consent of plaintiff company, passed an ordinance tending to impair the rights of the plaintiff, and threatening to destroy the railway tracks and property of the plaintiff within said village of Carthage.

Plaintiff prays for an injunction to prevent the commission of such threatened acts of violence.

By amendment to the petition facts are set up of proceedings leading up to the sale of the railway property, under a decree in the federal court, under which proceedings it is alleged the property was sold; and it was alleged that by an arrangement, the purchaser, one Kilgour, was to lease a portion and sell the rest of the railway to plaintiff. The title of plaintiff as obtained through and under said decree in the federal court was set up in the amendment to the petition.

By its answer, the defendant village raised the question of corporate capacity in the defendant village to grant an extension of a railway, constructed by a corporation, organized under the act of May 1st, 1852, and of the capacity of the Inclined Plane Company, the former owner of the railway, to accept such a grant, or to make an extension of its lines.

Plaintiff by reply takes issue with the answer as to want of corporate capacity in said village, or in the Inclined Railway Company, to do the acts claimed by the plaintiff company to have been done by them or by it, in extending its tracks as a street railway, or in accepting the same.

The issue thus presented by the pleadings is principally one of corporate capacity, and raises a question of law rather than of fact.

The material facts bearing upon the issue so presented may be summarized as follows:

The Inclined Railway Company was incorporated April 31, 1871, under the act of May 1st, 1852, for the purpose of constructing a railroad, the termini of which were to be in the city of Cincinnati and the village of Avondale, Hamilton county. On February 23d, 1889, the

terminus of the road was extended from its northern terminus at the Zoological Garden, in Avondale, to the village of Glendale, the company constructing an incline from Main street to Locust street on the top of the hill. This was done under an ordinance of the city of Cincinnati, passed June 16th, 1871.

The city of Cincinnati, by ordinance passed December, 1871, granted to the railway company the right to construct a railway from Main to Liberty street, and on Liberty to Walnut street; thence on other designated streets to the foot of the incline. October 2d, 1875, said city granted the company the right for thirty years to occupy with double tracks Locust street, commencing at the top of the incline; thence in a described route to the Zoological Garden.

On March 30th, 1877, the Legislature of Ohio passed an act ratifying and validating the grants embraced within the ordinances above referred to. (O. L., vol. 74, page 66.)

In 1885, permission was granted to the Inclined Plane Company by the city of Cincinnati, to use electricity as a motive power in the operation of its road. The county commissioners of Hamilton county, having control over the Carthage turnpike, extending from Ludlow avenue to its northern terminus in the village of Carthage, granted to the Inclined Plane Company the right to construct and maintain an extension of its railway in said pike, in consideration of the company paying into the county treasury on January 1st, 1891, \$500.00, and other designated amounts at fixed periods so long as the pike remained under the control of the commissioners.

The village of Carthage passed a resolution requesting the commissioners to grant the right of way to said Cincinnati Inclined Plane Railway Company to construct an electric street railway over said Carthage pike.

Without going into unnecessary detail as to the various intermediate acts and proceedings touching the title of plaintiff company, it may be further stated that: On August 7th, 1894, the village council of Carthage regularly passed an ordinance providing for the extension of the Cincinnati Inclined Plane Railway Company from the northern terminus of the Carthage pike over Main street and Lockland avenue to the north corporation line of the village of Carthage. By this ordinance the right to construct the extension to the northern line of the village was provided for.

For the purposes of this opinion, it will not be necessary to refer to the ordinance or its provisions further than to say, the company accepted this grant, and in 1894, constructed the extension to the northern corporation line of said village, and thence northwardly under grants from other municipal authorities to Lockland and Reading; and it paid annually, until the commencement of this action, to the village of Carthage, the sum of \$50, as prescribed in said ordinance.

December 12th, 1890, the city of Cincinnati commenced an action against the Cincinnati Inclined Plane Railway Company, in the Superior Court of that city, praying, among other things, that the Inclined Plane Railway Company might be enjoined from maintaining more than one track over Auburn avenue, between Mason and Vine streets, and be enjoined from maintaining a track on Main street over what is known as route eight, to Fifth street as described therein.

A decree was entered at the general term of the superior court, finding that said railway company was unlawfully maintaining and operating a street railway by double track, on certain designated streets in said city mentioned in said decree, and perpetually enjoined it

from maintaining any of its tracks in Main street, and from maintaining and operating more than one street railway track on Auburn avenue between Mason and Vine streets.

March 6th, 1895, the Louisville Trust Company (a foreign corporation), commenced an action against the city of Cincinnati in the Circuit Court of the United States, alleging the execution of a mortgage to it upon this property of the Inclined Plane Railway Company on January 1st, 1889, to secure \$500,000.00 of the bonds of said company, setting forth in its petition the grants by the city to said railway company of privileges, etc., and of the construction by the company of its road, and that the city threatened to remove the tracks of the railway company from the streets, and praying for an injunction to restrain the city from such threatened action.

The city answered, and among other things, set forth all the ordinances that had been passed; and also plead the action of the city in the Superior Court, and the judgment therein, and the affirmance of the same by the Supreme Court of Ohio.

Such proceedings were had in said action in the United States Circuit Court of Appeals, that it was decreed, that said ordinances were validated by the act of the Legislature of Ohio, of March 30th, 1877, and that the city should be enjoined from interfering with the company in the maintenance and operation of so much of its road, as had been constructed under the ordinances of December 1st, 1871, and October 27th, 1875. The decision in this action was affirmed by the Supreme Court of the United States, and remains in full force and effect.

Such proceedings were further had in the trust company's said action, that a decree was entered for the sale of said railway in two divisions: One part being the por-

tion lying south of the Zoological Garden, and the other being that portion lying north of the last named point, and extending to the villages of Lockland and Reading. Sale was had, and through its agent, one Charles H. Kilgour, the plaintiff company became the purchaser of that part of the road extending from the Zoological Garden northwardly, for \$187,500. The sale was confirmed and proper deeds were executed to said Kilgour, who subsequently conveyed the same to plaintiff company, and it, on June 4th, 1898, entered into possession and commenced the operation of said railway. August 4th, 1898, it commenced this action.

The cause comes into this court on appeal from the common pleas. It has been ably argued on both sides by counsel by briefs as well as by oral arguments. In the short time this court has had to consider the questions involved and to assign reasons for its conclusions, it can not be expected that we will go into much detail in stating our conclusions. Some of our conclusions of law will need be dogmatically stated, for want of time to give reasons therefor.

The first question to which attention will be directed is: What effect had the act of the legislature of Ohio, of March 30th, 1877, toward validating the ordinances of the city of Cincinnati, theretofore passed on June 16th, 1871, December 1st, 1871, and October 27th, 1875, granting to the Cincinnati Inclined Plane Railway Company (which company was organized under the act of May 1st, 1852), the right to construct a railway in certain designated streets in said city, and to occupy for a period of thirty years with double tracks certain streets, and with single track other named streets in said city. This act of the legislature of March 30th, 1877, being an enabling and curative act, is to be construed as such. Its object

and purpose was to give power to corporations theretofore as well as those thereafter to be organized under the act of 1852, the right to hold, lease or purchase, and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane; provided, that no other motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the board of public works in any city having such a board, and the common council or the public authority or company having charge or owning any other highway in which such street railroad may be laid; and, provided, that no inclined plane railway or railroad company shall construct any track or tracks in any street or highway without first obtaining the written consent of a majority of the property holders on the line of such proposed track or tracks, represented by the feet front of lots abutting on the street or highway along which such track or tracks are proposed to be constructed.

No such purchase or lease shall be made without the consent of the holders of the stock in the company purchasing or leasing, and in the company leasing or selling such street railroad or the owners thereof.

It is contended that the legislature could not validate the grants that had been made by the city to the Inclined Plane Company, under the said ordinance of 1871, and 1875, for the reason that the act could not have a retroactive effect. The rule in regard to the effect of curative statutes is,

“If the irregularity consists in doing some act, or doing it in the mode which the Legis-

lature might have authorized or made immaterial by prior law, it may do so by a subsequent one."

On this principle the legislature may validate contracts made *ultra vires* by municipal corporations. *Sutherland on Statutory Construction*, Section 483.

The most important question to be considered now is: Has the plaintiff company a legal title to the property involved, namely, the line of street railway described in its petition, and the right to maintain, occupy and operate the same?

Under the proceedings in the United States circuit court to which the city of Cincinnati was a party—although the defendant village was not a party—the property, said street railway was sold on foreclosure of mortgages described in that suit, and in which action the validity of the ordinance in question were involved.

The effect of the decree of the superior court, affirmed by the Supreme Court of the state, came under review, and it was in said action held and determined, that the ordinances in question were validated by the act of the legislature of March 30th, 1877; and thereupon it was ordered that the city of Cincinnati be and it was enjoined from interfering with the railway company in the maintenance and operation of its road, and under that decree the property was sold. The purchaser at such sale became and is subrogated to all the rights that the mortgagees had or could have under their mortgages, and the sale so made passes the title of the mortgagor so validated by this decree to the purchaser.

The title of the Inclined Railway Company was directly put in issue by the city in the action of the said, the Louisville Trust Company, in the United States Circuit

Court; not only was its title involved, but the city in said action pleaded the judgment of the superior court as affirmed by the Supreme Court of the state of Ohio in support of its contention, as a bar to any inquiry into the corporate capacity of the railway company to receive or hold these grants. The federal court had jurisdiction of the subject-matter, and of the parties, namely, the city of Cincinnati, the mortgagor, the Inclined Plane Railway Company, and the mortgagee—said trust company—and the validity of the mortgages were necessarily involved, as well as the rights of said mortgagor, the Inclined Plane Railway Company, under said ordinances.

The United States Circuit Court having such jurisdiction, its decree determined and settled the title of the mortgagor, as well as of the mortgagees under their mortgages, and by holding that the judgment of the superior court as affirmed by the Supreme Court, was not conclusive as to the corporate capacity of the Inclined Plane Company to acquire its property, the purchaser at said sale had the right to look to and rely upon the decision of the circuit court as a source of title to the property of the plaintiff. We understand the rule of law to be, that where a party has obtained judgment in his favor, as did the city of Cincinnati, in the superior court, and afterwards becomes a party to another action in which such prior judgment was, or could be pleaded as a bar, but either failed to make the plea, or having made it, the plea was overruled for any reason, and a contrary judgment was entered in the latter case, the last judgment will govern, and the former judgment is, in effect annulled. *Freeman on Judgments* (4th Ed.), Vol. 1, Sec. 332; *Semple v. Wright*, 32 Cal., 659, 669; *Semple v. Ware*, 42 Cal., 619-621.

“Of two decrees rendered by the same court upon the same rights, between the same parties, the latter decree is binding.” *Cooley v. Brayton*, 16 Iowa, 10; *Bateman v. Grand Rapids & I. R. Co.*, 96 Mich., 441.

The plaintiff company having acquired its title under the decree of the United States court, and being in privacy with the rights so adjudicated in favor of the mortgagee, it is entitled to be subrogated and to have and enjoy the rights, privileges and powers which were settled and established by that judgment and decree in favor of said Inclined Plane Company through said mortgagees.

“The purchaser at a sale made for the enforcement of a mortgage or other lien, is subrogated to the rights of the original lien holder, even though the proceedings were invalid and his purchase has been avoided. Unless he secures a title under his purchase, the sale is treated as an equitable assignment of the mortgage to him, and his grantee takes the same right.”

Sheldon on Subrogation, Section 31, and authorities cited in notes, 5, 6, 7.

In *Brobst v. Brock*, 10 Wallace, 519, at page 534, the court say:

“It is enough that an irregular or void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee as such had. For this authority is hardly needed. We may, however, refer to *Gilbert v. Cooley*, Walker’s Chancery (Mich.), 494; where it was held that though a statutory foreclosure of a mortgage be irregular, and no bar to the

equity of redemption, yet the purchaser at the sale succeeds to all the interests of the mortgagee."

This brings us to the question of the effect of the judgment of the Circuit Court of the United States, which was affirmed by the Supreme Court, in the case of the Louisville Trust Company, *supra*. The trust company was a foreign corporation, and the city of Cincinnati was a defendant, which gave the circuit court in this state jurisdiction of the action. United States Constitution, Article III, Section 2. The state courts of this state also had jurisdiction to determine the controversy between the trust company and the city of Cincinnati involved in the action. In other words, the Circuit Court of the United States and the courts of this state had concurrent jurisdiction to determine whether the mortgage of the trust company was valid, and whether the corporate capacity and power of the Inclined Plane Company were extended and validated by the act of the Legislature of March 30th, 1877, and the adjudication of either court would have been conclusive upon the other. The judgment of the Circuit Court of the United States must be given the same force and effect by the courts of this state, as is given to the judgment of the state court. *Crescent City Live Stock Company v. Butcher's Union*, 120 United States, 141; 2 *Black on Judgments*, Section 938.

In the case cited, the court said:

"And their (the judges of the circuit court) judgment or decree when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity and its effect are complete in all respects between all

parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense either by plea, or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate."

The plaintiff company having acquired its title under the decree of the United States Court, and it being in privity with the rights so adjudicated in favor of the mortgagees, it is entitled to have and to enjoy the rights, privileges and powers which were established by that judgment through the Inclined Plane Company, the mortgagor, and in favor of the Louisville Trust Company, the mortgagee.

The conclusion therefore is, that the plaintiff company has a good title to its right-of-way and the franchises granted by the city of Cincinnati under and by virtue of the ordinances of 1871 and 1875.

The plaintiff company having such title, our next inquiry will be: How, if at all, can the defendant village deprive it of these rights, or prevent the plaintiff from operating or using its road?

The contention is, that the defendant village was not a party to the suit in the United States Circuit Court, and therefore is not bound by its decree, and that it has the right by ordinance or otherwise, to abate the railway of plaintiff by removing its railway tracks and destroying the same, or, as prayed for in its amended answer and cross-petition, by decree of the court have a mandatory injunction, requiring the plaintiff to remove its rails from

the Carthage pike and other streets in the village of Carthage.

This presents two questions:

First. Can the defendant village abate the railroad as a nuisance by ordinance?

Second. Can it abate the railroad by proceedings in equity by injunction?

As to the first proposition. The questions of nuisance or obstruction must be determined by general and fixed rules of law, and it is not to be tolerated that the local municipal authorities of a city can declare any particular business or structure a nuisance in such a summary mode, and enforce its decision at its own pleasure.

By Section 2640, Revised Statutes of Ohio, the council of an incorporated village has the supervision and control of all public highways, streets, etc., within the corporation, and shall cause the same to be kept open and in repair and free from nuisances. But the provision does not authorize a village or city council by mere declaration to determine that a certain structure is a nuisance unless it, in fact, has that character.

Justice Miller in *Yates v. Milwaukee*, 10 Wallace, 497-505, says:

“It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city, or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration, that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself.”

In the process of abating a nuisance there are limitations, both in respect to the agency which may be employed, and as to what may be done in execution of the

remedy. The general proposition has been asserted in text-books and repeated in judicial opinions, that any person may abate a public nuisance. But the best considered authorities in this country and England hold, that a public nuisance can only be abated by an individual when it obstructs his private rights or interferes at the time with his enjoyment of a right common to many, as the right of passage upon the public highway, and he thereby sustains a special injury. The public remedy is ordinarily by indictment for the punishment of the offender, wherein, on judgment of conviction, the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed in behalf of the people. The plain reason of the rule is, that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. *Lawton v. Steele*, 119 N. Y., 226; s. c., 16 Am. St. Rep., 813.

Therefore, when the village of Carthage was threatening to destroy the tracks and property of the plaintiff within the village, it gave the plaintiff its right of action against the village, to enjoin it from committing such violence.

Has the village of Carthage the right to resort to its action in equity, as claimed in its cross-petition, namely, for an injunction restraining the plaintiff company from operating its railroad in and through the streets of said defendant village?

It may be stated as a fact, not disputed, that the occupancy of the street and turnpike was not only with the consent of the village, but through its council the road was located, extended and double tracked at its special instance and request; or, in other words, briefly stated, we have a case where a municipal corporation, through

its council, invites a company or corporation to come into its corporate limits and to occupy its streets with railroad tracks for the purpose of operating a street railway, and upon such action on the part of the village, the corporation does enter and expends money, equips a line of railroad at great expense, and does other acts and expends large sums of money in equipping its road for use and operation in connection with its line so constructed, by inducements so held out to it by the village.

After such action on the part of the village, suppose it to have acted irregularly in the matter, so far as its municipal action through its council is concerned, can it afterwards repudiate its action, and by a suit in equity or otherwise, revoke its action and destroy the rights and property so acquired by the railway company? We think not. Coming thus into a court of equity the village must come without fault, and its action must be free from taint.

And this brings us to the consideration of the second proposition that we deem necessary to consider, namely, is the village estopped?

The village of Carthage did more than to stand by and silently see the corporation, the predecessors of the plaintiff in the chain of title, construct a street railroad in and upon its streets. It, by resolution and by solemn acts of its council urged and encouraged it to do so. How can that same village be heard to say that the action of its council was wrong, unauthorized, and that it had no power to give the privileges or make the grants it attempted to do? We think this is a question the village is not in a position to raise in a court of equity. The village is in the same position of a party who stands by and sees a public enterprise, such as a railroad, constructed in its streets at great expense with other valuable interests at-

tached thereto. It is then too late for it, after the enterprise is consummated and large sums of money have been expended on the strength of their action and active encouragement, to seek by injunction or otherwise to deny the right of the company making the improvements or its successors to use the property. *Goodin v. Cincinnati Whitewater Canal Company et al*, 18 Ohio St., 169, 179; *Pennsylvania Company v. Platt et al*, 47 Ohio St., 366-381.

In the case of *City Railway v. Citizens Railway*, 166 United States, Justice Brown, at page 566, says:

“All that is necessary to create an estoppel in *pais* is to show that upon the faith of a certain action upon the part of the city, which it had power to take, the company incurred a new liability, as for example, by the negotiation of a new loan and the issue of new bonds and mortgage to secure the same.”

The doctrine of estoppel in *pais* applies the same to municipal corporations as to individuals. *Board of Supervisors Logan Co. v. City of Lincoln*, 81 Ill., 156; *The Union Depot Company v. The City of St. Louis*, 76 Mo., 393; *Grant v. City of Davenport*, 18 Iowa, 180, 187, 188; *The City of Atlanta v. The Gate City Gas and Light Co.*, 71 Ga., 106; *Bigelow on Estoppel*, 376; *Athens v. Georgia R. R. Co.*, 72 Ga., page 80; *Oshkosh Common Council v. State*, 59 Wis., 425; *Chicago & Northwestern R. R. Co. v. People*, 91 Ill., 251; *Rio Grande R. R. Co. v. Bromelle*, 4 Tex., 88; *Herman on Estoppel* (1st Ed.), page 527, Section 563; *Tone v. Columbus*, 39 Ohio St., 281-310; *Lane v. Kennedy et al*, 13 Ohio St., 42-49; *Elster v. Springfield*, 49 Ohio St., pages 82-98.

Consideration of public policy as well as recognized principles of justice between parties, require that we

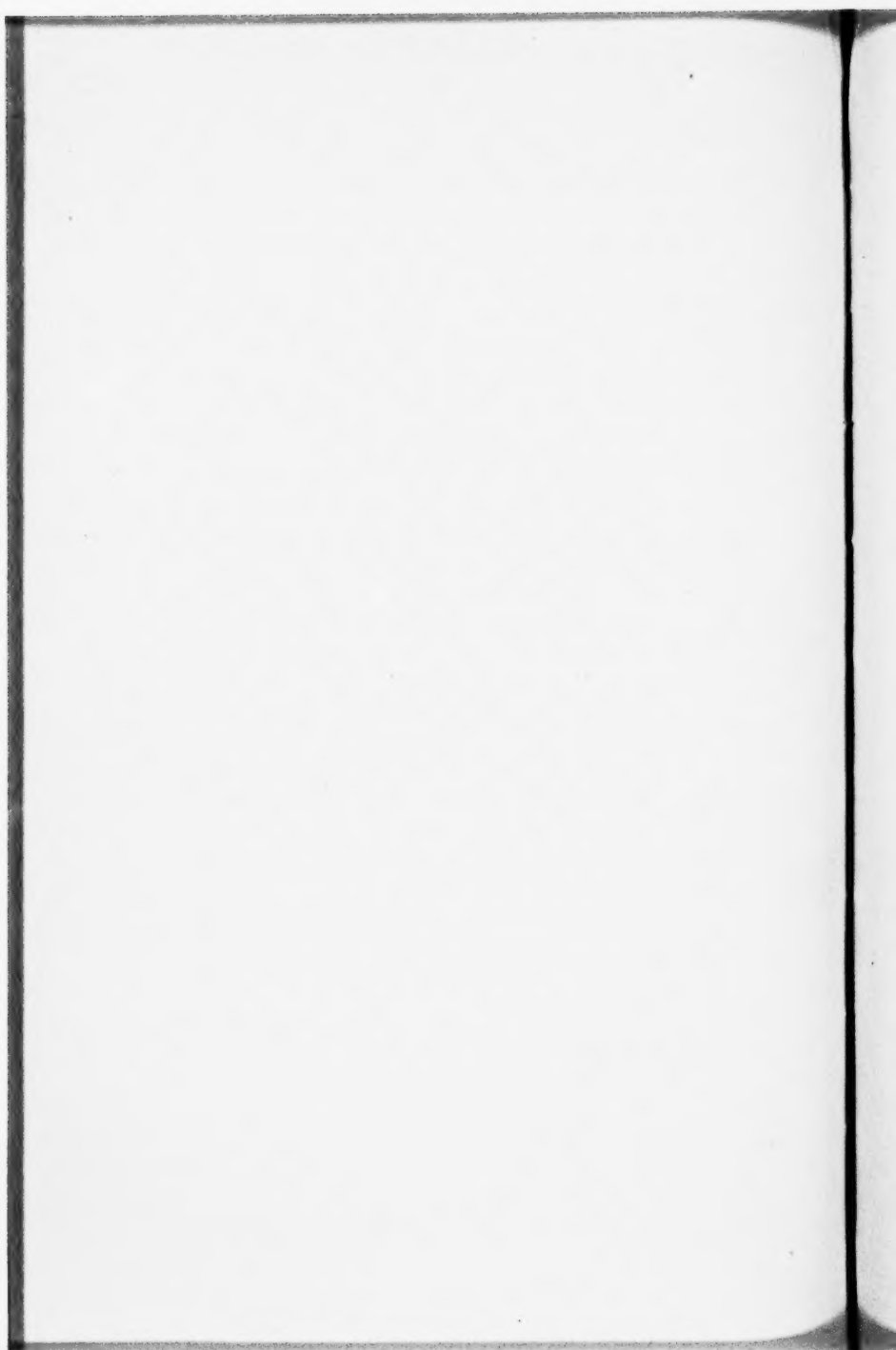
should hold in this case that the property of the plaintiff can not be interfered with by the village of Carthage; nor can it now revoke the action of its council whereby it granted the right to occupy its streets for the plaintiff's street railway.

The cross-petition of the defendant village is dismissed and the injunction of the plaintiff is made perpetual; defendant to pay the costs of this action.

ADAMS and DOUGLASS, JJ., concurred.

E. W. Kittredge and John W. Warrington, for plaintiff.

Samuel B. Hammel and John R. Sayler, for defendant.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

No. 10

THE CITY OF CINCINNATI,

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vs.

THE CINCINNATI & HAMILTON TRACTION CO.,
ET AL.,

Appellees.

Supplemental Brief for Appellees on Re-Argument

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I

On page 15 of reply brief for appellant on re-argument, reference is made to what is described as "the well settled doctrine of this court," etc., that the power of a city or other agency of the State to deprive itself of the legislative function of fixing rates will never be implied; citing *Milwaukee Electric Railway Co. v. Railroad Commission of Wisconsin*, 238 U. S. 174.

That doctrine is not involved here because:

(a) The ordinance in question does not purport to fix rates for operation under an existing franchise. It

declares that there is no franchise and offers a temporary license on certain specified terms, including reduced rates; the alternative being to cease operating.

(b) The City of Cincinnati has not "the legislative function of fixing rates from time to time" for street railways. It has that express power with reference to companies furnishing steam and hot water (Gen. Code of Ohio, sec. 3644) and gas, water and electricity (Gen. Code 3982-3) subject to appeal to the Public Utilities Commission (Gen. Code 614-44). It has the power to prescribe terms and conditions *in making a street railroad grant* (Gen. Code 3768; R. S. 2501) and must make the grant to the corporation which will "agree to carry passengers at the lowest rates of fare" (Gen. Code 3770; R. S. 2502). The rates so fixed are conclusive on the city (*Cleveland v. Cleveland City Railway Company*, 194 U. S. 517) and are not subject to revision by the Public Utilities Commission (Gen. Code 614-47).

Except as above expressly set forth the city has no rate making powers. An express grant is necessary to confer regulative powers.

Ravenna v. Pa. R. R. Co., 45 O. S. 118.

Ohio Electric Ry. Co. v. Ottawa, 85 O. S. 229, 237.

A general rate making power over all public utilities, subject only to the qualifications above noted, is given to the Public Utilities Commission (Gen. Code 614-22, 23) on complaint by any person or on the initiative of the Commission.

II

The commissioners' grant is not a "special privilege or immunity" subject to be "revoked or repealed by the General Assembly" (Ohio Constitution, Article I, Section 2).

A non-exclusive grant, even in perpetuity, is not a special privilege or immunity. In *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, at page 659, it was said:

"The general repeal of all special privileges, referred to in the statute, related to exclusive grants, tax exemptions, monopolies and similar immunities (Ky. Stat. 573; *Covington v. Kentucky*, 173 U. S. 231), and not to those corporate powers and property rights needed and conferred in order to enable the company to perform the duties for which it had been organized."

In *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, this court says, at page 114:

"But it is said that this grant can not be held to be in perpetuity, because to do so is to bring it in conflict with Section 16 of Article I of the state constitution, which declares that 'no law making any irrevocable grant of special privileges or immunities shall be passed,' and this contention is made although it is conceded, as it must be, that the grant is not exclusive and does not prevent the city from making like grants to others or from establishing and operating a competing municipal plant. The contention is answered and shown to be untenable by the decision of the Supreme Court of the State in *Plattsmouth v. Nebraska Telephone Co.*, *supra*, from which we excerpt the following (p. 464):

"The argument upon which it attempts to maintain the invalidity of the statute [ordinance] is as follows:

Section 15, Article III of our constitution, prohibits the legislature from passing local or special laws granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever; and it is said that the legislature can not delegate to a municipality a power which it can not itself exercise. It is claimed that the ordinance in question is an attempt to grant to the defendant a special privilege or franchise, and that this is beyond the power of the municipal authorities. If we should concede (which we do not) that a general law, granting to cities and towns the powers which are usually found in their charters, did not confer upon such municipalities the power to pass and enforce special ordinances suited to their local conditions, still the ordinance in question is not subject to the criticism made upon it. A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right. * * * Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corporations the same privileges awarded to the defendant. The contention, therefore, that ordinance No. 91 is void and confers no right upon the defendant can not be sustained.' "

The Supreme Court of Ohio in *State ex rel. Pontius v. Northern Ohio Traction & Light Co.*, 93 O. S. 466—No. 60, October term, 1917, in this court, did not hold the commissioners' grant there involved to be revocable under the reserved power of repeal in the Ohio Constitution above quoted. While the minority opinion discusses the effect of that provision and considers that the commissioners can not exercise the power thus reserved to "the General Assembly," the judgment of the court is expressly based on

East Ohio Gas Co. v. City of Akron (81 O. S. 33), which makes no reference to the constitutional reserved power of repeal, but is founded solely on the construction of the contract.

Furthermore, the reserved power of repeal is to be exercised "by the General Assembly" and even a repealable grant is a contract protected by the constitution, until repealed by the General Assembly.

In *City Railway Co. v. Citizens Street Railroad Co.*, 166 U. S. 557, it was said on page 563:

"It is true that, by section eleven of the original act of 1861, a right was reserved to the general assembly to amend or repeal at their discretion the act authorizing the incorporation of street railway companies; but that was a right reserved to the general assembly itself and was never delegated, if in fact it could be delegated, to the common council of the city."

In *Detroit v. Detroit Citizens Street Railway*, 184 U. S. 368, it was said (p. 397):

"The legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power to do so is not involved in this case."

In *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S. 649, it was said at page 659 that the franchise there under discussion,

"could not, of course, be repealed, nullified or forfeited by any ordinance of a General Council."

See also to the same effect, *Hudson v. Jersey City*, 49 N. J. L. 303.

An ordinance of a City Council or County Board of Commissioners may be a "law" of the State, within the

meaning of the contract clause of the constitution, "to which a State gives the force of law" (*Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 555), because enacted by an "instrumentality of the State exercising delegated legislative authority" (*Ross v. Oregon*, 227 U. S. 150, at p. 163) "under supposed legislative authority" (*Northern Pacific Railway v. Duluth*, 208 U. S. 583, 590) without being an authorized exercise of the legislature's right of repeal, which, if capable of delegation at all, could only be delegated by clear and express language. The legislative authority for the purpose first mentioned need only be asserted or "supposed"; for the second purpose, it must be actual and express.

A city claiming that a street railway franchise has expired, has the "delegated legislative authority," under its general power over the streets, to order and enforce the removal of the tracks from the streets, and its ordinance for that purpose is a "law" of the state within the meaning of the contract clause; but if the city is wrong in its claim that the franchise has expired, the ordinance can not be converted into an exertion of the power of repeal reserved to "the General Assembly," because that power has not been delegated to the city.

The Statutes of Ohio authorize the County Commissioners and municipalities to make grants, but there are no statutes which even purport to authorize them, or any other local authorities, to repeal grants when made.

Further, the ordinance complained of in this case does not purport to repeal, expressly or by implication, any of the grants herein claimed, but is based solely on the assertion that those grants were never made or have expired.

III

Recent decisions asserting the right and duty of this court to exercise its independent judgment, in cases involving the contract clause, in all matters relating to the existence, meaning and impairment of the contract are:

Russell v. Sebastian, 233 U. S. 195.

Detroit United Ry. Co. v. Michigan, 242 U. S. 238, 249.

IV

Owensboro v. Cumberland Tel. Co., 230 U. S. 58;

Louisville v. Cumberland Telegraph & Tel. Co., 224 U. S. 649;

Boise Water Co. v. Boise City, 230 U. S. 84,

have frequently been referred to in later decisions of this court, but have never been modified or limited:

Russell v. Sebastian, 233 U. S. 195, 204.

Electric Lines v. Empire City Subway, 235 U. S. 179, 192, *et seq.*

Seaboard Air Line Ry. v. Raleigh, 242 U. S. 15, 19.

All of which is respectfully submitted.

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CITY OF CINCINNATI *v.* CINCINNATI & HAMIL-
TON TRACTION COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO.

No. 10. Argued January 24, 25, 1916; restored to docket for reargument June 12, 1916; reargued October 26, 27, 1916; restored to docket for reargument May 7, 1917; reargued October 17, 18, 1917.—Decided January 7, 1918.

Corporations of Ohio claimed the right to operate a street railway in Cincinnati according to the terms of various grants, etc., under which it had been built in sections or links. A revocable ordinance of the city council, after reciting that as to portions of the streets so occupied, "alleged grants" had expired, and on others there never had been any grants and the companies had no longer any right to occupy the same, provided that the companies might continue

to operate, but only from day to day, and subject to new and material conditions, as to fares, transfers, etc.; that should it be adjudged that they were without continuing right in respect to portions only of the streets occupied, the ordinance should be construed to forbid further operation on such portions except on compliance with all of its terms and conditions; that continued operation "on said streets" should be deemed an acceptance by the companies of the ordinance and all its terms; that in case they refused or failed to comply with it on its effective date, the city solicitor should "take such legal proceedings as may be proper and necessary" to enforce its provisions, or to require them "to abandon the streets covered by this ordinance, and to remove their tracks from said streets." Averring that the ordinance impaired and attempted to impair the obligations of the several grants etc., that its enforcement would deprive them of their property without due process or compensation, and that, under it, the city threatened to, and unless restrained would, interfere with and prevent the maintenance and operation of the railway over the routes described in the grants aforesaid and under authority and in accordance with the terms thereof, thus causing irreparable injury, the companies, by their bill, filed in the District Court before the ordinance became effective, prayed that it be decreed void and that the city be perpetually enjoined from such interference, in any way, as to the whole and any part of the railway, and from enforcing, or taking any steps to enforce, the ordinance in whole or in part. The city's answer denied jurisdiction, that the bill stated a cause of action, that the companies had any right to operate as to certain portions of the line, that the city would interfere with or prevent the maintenance and operation by plaintiffs of the said railway, or cause any damage or injury to plaintiffs; and averred that enforcement of the ordinance was only authorized, and only would be sought, by due court proceedings. After full hearing the District Court upheld the grants, etc., involving complicated questions, under the laws of Ohio, and granted the injunction as prayed. *Held* (1) that the jurisdiction of the District Court was properly invoked, and that it had power to adjudicate the issues presented; but (2) that, as counsel for the city in this court had plainly conceded, what did not sufficiently appear by the answer, viz: that, except as it authorized proceedings in court the ordinance could have no effect prior to a judicial determination and that no other steps could be taken under it, or would be attempted, by the city's officers to enforce it, the decree should be modified so as to exclude any finding upon the validity of the franchises and rights claimed by plain-

tiffs, and so as to limit affirmative relief to an injunction restraining the city (a) from taking any steps, other than necessary court proceedings, to enforce the ordinance, prior to final adjudication of the controversies involved, and (b) from ever setting up claim that plaintiffs' continued operation of cars over streets now used, pending such final adjudication, does or will amount to an acceptance of the ordinance or in any way prejudice their rights.

Upon appeal, the cause is subject to review upon both law and facts, and that relief should be granted which is proper upon the case as it develops in this court.

Modified and affirmed.

THE case is stated in the opinion.

Mr. Charles A. Groom, with whom *Mr. Constant Southworth* was on the briefs, for appellant.¹

Mr. Alfred C. Cassatt and *Mr. Lawrence Maxwell*, with whom *Mr. George H. Warrington* and *Mr. Ellis G. Kinkad* were on the briefs, for appellees.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

The Cincinnati and Hamilton Traction Company is owner and The Ohio Traction Company lessee and operator of an electric railway line extending from Vine Street,

¹ At the first hearing *Mr. Constant Southworth* argued for the appellant. *Mr. Walter M. Schoenle* was with him on the brief.

The arguments went deeply into questions of local law touching the franchises claimed by plaintiffs, which are not passed on by the court. Upon the question of jurisdiction, in addition to the authorities mentioned in the dissenting opinion, the city cited, among others, the following cases: *Mindler v. Georgia*, 183 U. S. 559; *Barney v. New York*, 193 U. S. 430; *Louis. & Nash. R. R. Co. v. Garrett*, 231 U. S. 298; *Seattle Elec. Co. v. Seattle &c. Ry.*, 185 Fed. Rep. 365; *Louisville Tr. Co. v. Cincinnati*, 76 Fed. Rep. 296; *Seaboard Air Line v. Raleigh*, 219 Fed. Rep. 573; *Mallinckrodt Works v. St. Louis*, 238 U. S. 41.

Cincinnati, northward along Erkenbrecher Avenue, Carthage Pike, Wayne Avenue, Springfield Pike, etc., some five or six miles to the city limits. It was built in sections or links under grants, ordinances, permissions, contracts, etc., whose validity, effect, and continuation have given rise to conflicting contentions, based primarily upon different interpretations of statutes and laws of Ohio. April 21, 1914, the City Council passed the ordinance copied in the margin.¹

¹ AN ORDINANCE NO. —.

Specifying the terms and conditions upon which The Cincinnati and Hamilton Traction Company and The Ohio Traction Company, as its lessee, may operate street cars on certain streets of the city, and authorizing the City Solicitor to take legal proceedings to enforce this ordinance.

Whereas, The Ohio Traction Company, as lessee of The Cincinnati and Hamilton Traction Company, is now operating street cars on certain streets of the City of Cincinnati; and

Whereas, on portions of the streets so occupied and used alleged grants have heretofore expired and on other portions, including that part of Carthage Pike formerly known as Springfield Pike there never have been any grants and said companies have no longer any right to occupy the same; now, therefore,

Be it ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That upon the terms and conditions in this ordinance specified, and upon no other, permission is hereby granted to said The Cincinnati and Hamilton Traction Company and to The Ohio Traction Company, as its lessee, to continue from day to day only from the date on which this ordinance becomes effective to operate street cars on the following streets, to wit:

Erkenbrecher Avenue from Vine Street and Erkenbrecher Avenue to Carthage Avenue; thence north on Carthage Avenue and Carthage Pike (formerly called Main Street) to Lockland Avenue, excepting the portions in the municipalities of St. Bernard and Elmwood Place; thence north on Lockland Avenue and Anthony Wayne Avenue to the northern boundary of the City through the district formerly known as Hartwell; and also from the intersection of Anthony Wayne and Woodbine (formerly called Rural) Avenues westwardly over Woodbine Avenue and over Decamp Avenue to Carthage (formerly called Springfield) Pike; thence north on said Carthage Pike to the northern

Shortly before the ordinance was to become effective, appellee companies—both Ohio corporations—filed a bill in the United States District Court, Southern District of Ohio, wherein they set out their interest in the railway, the various grants, ordinances, contracts, etc., under which it had been constructed, together with rights claimed. It then alleged: "Notwithstanding the contract rights of plaintiffs as hereinabove set forth, the defend-

boundary of the City in the District formerly known as Hartwell; on the tracks now existing in said streets.

Section 2. On and after the taking effect of this ordinance the operation of street cars on said streets shall be subject to the same terms and conditions as existed under the prior alleged grants, if any, so far as not inconsistent with the provisions of this ordinance, and shall be subject to the following conditions:

A. That the necessary arrangements be made to operate cars from the aforesaid northern boundary of the City over said streets to Sixth and Walnut Streets in substantially the same manner and with substantially the same frequency as now, and as a continuous line; and that street cars shall be operated.

B. That for a continuous trip between any two points between the aforesaid northern boundary of the City and Sixth and Walnut streets the fare for each passenger shall not exceed five (5c) cents except that for children under ten years of age the fare shall not exceed three (3c) cents, and children in arms shall be carried free.

C. That the necessary arrangements be made so that without additional charge passengers on street cars operated on the streets mentioned in Section 1, and passengers on street cars operated by The Cincinnati Traction Company may transfer to and from either to the other; but transfers given hereunder shall be good only on the first street car available and on one not going in a substantially parallel and opposite direction.

D. That during the operation of this ordinance the Director of Public Service may make from time to time further and reasonable regulations as to the character, mode, manner and frequency of service and maintenance of the street cars and tracks.

Section 3. Should it be adjudged that on only a portion or portions of the said streets now occupied by the tracks of said The Cincinnati and Hamilton Traction Company the right to operate street cars has never been granted, or if granted has ceased to exist, then this ordi-

ant, The City of Cincinnati on or about the 21st day of April, 1914, passed . . . [the ordinance copied, *ante*]; in and by said ordinance said City repudiated the grants aforesaid and thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10, of the Constitution of the United States, and the enforcement of said ordinance will deprive plaintiffs of their property without due process of law and without compensation, in

nance shall be construed to forbid the further operation of street cars on such portions except on the compliance by the said The Cincinnati and Hamilton Traction Company and The Ohio Traction Company and each of them with all of the terms and conditions specified in this ordinance.

Section 4. The continuing by said companies, or either of them, to operate street cars on said streets shall be deemed an acceptance of this ordinance and of all the terms hereof.

Section 5. In case The Cincinnati and Hamilton Traction Company and The Ohio Traction Company, or either of them, refuse or fail to comply with the terms of this ordinance upon the taking effect hereof, the City Solicitor shall be, and he is hereby authorized and directed to take such legal proceedings as may be proper and necessary to enforce the provisions of this ordinance, or to require the said companies and each of them to abandon the streets covered by this ordinance, and to remove their tracks from said streets.

Section 6. Should The Cincinnati and Hamilton Traction Company and The Ohio Traction Company, or either of them, surrender or transfer all or any part of their rights, if any, to operate street cars over all or any part of the aforesaid streets, to The Cincinnati Street Railway Company, or to The Cincinnati Traction Company, either or both, this ordinance shall apply also to the two last named companies, either or both as the case may be.

Section 7. Should any part of this ordinance be adjudged invalid, such adjudication shall not affect the validity of the remainder of this ordinance.

Section 8. This ordinance and any rights granted or acquired hereunder are subject to repeal, amendment, or revocation in whole or in part at any time at the will of Council.

Section 9. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

violation of the Constitution of the United States and particularly Article XIV in amendment thereof." "The defendant, The City of Cincinnati, by its agents and employes, under the pretended authority of the ordinance of the City of Cincinnati aforesaid, threaten to and will, unless restrained by order of this Court, interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof, which will cause great and irreparable injury to these plaintiffs for which they have no adequate remedy at law." It prayed: "That the Court decree said ordinance passed April 21, 1914, to be null and void, and that the defendant, The City of Cincinnati, and its officers, agents and employes, be enjoined by a restraining order, preliminary injunction, and final decree, from interfering or attempting to interfere in any way with the maintenance and operation, or either, by the plaintiffs, or either of them, of said line of electric street railway or any part thereof; and from enforcing or attempting or taking any steps to enforce the pretended ordinance of The City of Cincinnati, aforesaid, or any part thereof, and from taking any action which would alter, impair, limit, or destroy, the right and title of plaintiffs under their said grants and contracts."

Answering, the City denied jurisdiction of the court; that the bill stated a cause of action; that complainant companies had any right to operate a railway on Erkenbrecher Avenue or over portions of Carthage Pike or over streets and roads formerly in the Village of Hartwell, etc. And further "the defendant denies that under the authority of said Ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs, or either of them, of said electric street railway, or cause any damage

or injury of any kind to the plaintiffs, or either of them, and defendant avers that the enforcement of said Ordinance is only authorized and will only be sought by and through an order of a Court of competent jurisdiction first had and obtained, and after a hearing on due and reasonable notice to all interested parties."

Having finally heard the cause upon a record presenting many difficult problems arising under local laws, the trial court sustained its jurisdiction, adjudicated in favor of the companies in respect of the grants, ordinances, and contracts relied upon, and granted an injunction as prayed. The City has appealed and the questions presented below have again been elaborately discussed before us.

There is radical disagreement concerning interpretation and effect of the Ordinance of April 21st. Counsel for appellees maintain: "The City does not seek to eject plaintiffs from the occupancy of any particular part of the streets in question, but undertakes by the ordinance complained of to require plaintiff, in disregard of its rights under existing contracts, some of which the ordinance assumes may be good, either to abandon its line over the route in question, or to operate it on a day-to-day license and at a reduced fare." "The question, therefore, is not whether there is one bad link, but whether there is one good link, because, if there is a good link, the ordinance impairs its obligation."

"All parts of the ordinance go into operation at once at 'the earliest period allowed by law,' which is thirty days after it is filed with the mayor. The day the ordinance takes effect it gives to passengers the right to a reduced fare and transfers; and at the same time the companies, by operating on the said streets, are deemed to have accepted all the terms of the ordinance, which apply to all the links. This operation of the ordinance, and these results, do not await any litigation or any adjudication of any kind."

"While Section 5 authorizes and directs the city solicitor in the event of non-compliance to take the proper legal proceedings to enforce the ordinance, they might not be taken, and the operation of the ordinance does not await the beginning or outcome of such proceedings, nor is the city precluded by Section 5 from enforcing it in any other way, by tearing up the tracks or otherwise."

In the brief for appellant it is said: "These two provisions [§§ 3 and 5] clearly indicate that the rights of the City must be and will be established only after an orderly procedure through the courts, and it was contemplated and directed that this should be through legal proceedings brought by the Solicitor." "The fair reading of Section 4 is that the operation of the cars over the portion of the line where it is adjudged appellees have no franchise shall be an acceptance of the ordinance." During the oral argument here counsel for the City expressly affirmed, that properly construed and except as it authorized proceedings in court, the ordinance could have no effect prior to a judicial determination of the parties' rights; that until this was had no other steps could be taken, or would be attempted, to enforce the ordinance, and non-compliance therewith would in no wise injuriously affect the appellees. And, moreover, that the above quoted paragraph from the answer was intended to express that view.

We think the jurisdiction of the court below was properly invoked and that it had power to adjudicate the issues presented. *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368; *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58.

As the cause is here upon appeal, it is subject to review upon both law and facts; we should grant the relief proper under circumstances now disclosed. *Wiscart v. D'Auchy*, 3 Dall. 321, 327; *Capital Traction Co. v. Hof*, 174 U. S. 1, 37; *Daniell's Ch. Pl. & Pr.* (5th ed.), *1484, *1489; *Elliott v. Toeppner*, 187 U. S. 327, 334.

The answer failed to set out with adequate precision, if at all, what counsel now claim were the powers of the City's officers under, and its purposes in respect of, the ordinance—otherwise a different result might have been reached in the trial court. Accepting, and for all purposes of the cause relying upon representations and admissions of counsel for the City as above detailed, we conclude that the decree below should be modified so as to exclude from it any finding concerning validity of franchises involved or rights claimed by appellees and to limit the affirmative relief granted to an injunction restraining the City (1) from taking any steps to enforce the ordinance (except institution of necessary court proceedings) prior to final adjudication of controversies involved, and (2) from ever setting up a claim that appellees' continued operation of cars over streets now used pending such final adjudication does or will amount to an acceptance of the ordinance by appellees, or in any way prejudice their rights.

As modified, the decree below is affirmed. Appellant will pay all costs.

Modified and affirmed.

MR. JUSTICE CLARKE, dissenting.

The opinion and decree announced in this case seem to me so unsupported by the record and so unusual in character that I am impelled, reluctantly, to state my reasons for dissenting from both.

The court finds that the District Court had and that this court now has jurisdiction in the case such as to warrant permanently enjoining the City of Cincinnati in the two respects stated in the opinion, and with instructions to limit its decree to such an injunction the case is remanded to the District Court, leaving open for further litigation the validity and effect of the Ordinance of April 21, 1914 (copied in the margin of the court's opinion) and of prior grants claimed by the plaintiffs.

Assuming as we must that if the District Court had jurisdiction of the cause it had authority to go forward and completely dispose of the controversy, this action taken by the majority of the court seems to me to be anomalous if not unprecedented.

But my dissent goes also upon the more fundamental ground that the District Court did not have, and that this court does not now have, any jurisdiction over the case, for reasons which I shall state as briefly as I may.

The bill alleges that the plaintiffs and the defendant are all Ohio corporations, and after setting out in detail the grants which had been made to the plaintiffs over the various routes described in the Ordinance of April 21, 1914, it continues in paragraphs thirteen and fourteen, as follows:

"13. Notwithstanding the contract rights of plaintiffs as hereinabove set forth, the defendant, The City of Cincinnati, on or about the 21st day of April, 1914, passed a certain alleged ordinance entitled, 'An Ordinance No. —. Specifying the terms and conditions upon which the Cincinnati and Hamilton Traction Company and The Ohio Traction Company, as its lessee, may operate street cars on certain streets of the City, *and authorizing the City Solicitor to take legal proceedings to enforce this ordinance,*' a copy of which is hereto attached, marked Exhibit A, and made a part hereof; *in and by said ordinance* said City repudiated the grants aforesaid and thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10, of the Constitution of the United States, and the enforcement of said ordinance will deprive plaintiffs of their property without due process of law and without compensation, in violation of the Constitution of the United States and particularly Article XIV in amendment thereof."

"14. The defendant, The City of Cincinnati, by its

agents and employees, under the pretended authority of the ordinance of the City of Cincinnati aforesaid, threatens to and will, unless restrained by the order of this Court, interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof, which will cause great and irreparable injury to these plaintiffs for which they have no adequate remedy at law."

Since there is no diversity of citizenship there must be found in these two paragraphs, if anywhere in the bill, the assertion of federal right sufficient to give jurisdiction to the district court.

Confining our attention to paragraph 13. It seems to me very clear that this paragraph simply alleges that the City passed the ordinance, copied in the margin of the court's opinion, and thereby authorized "the City Solicitor to take legal proceedings to enforce" it. This allegation is emphasized by making the ordinance, by reference, a part of the bill, which in § 5 specifically provides that if the plaintiffs shall fail or refuse to comply with the terms of the ordinance "*the City Solicitor shall be, and he is hereby authorized and directed to take such legal proceedings as may be proper and necessary to enforce the provisions of this ordinance,*" or to require the companies to remove their tracks from the streets. The making of this declaration by ordinance, it is averred, impaired the obligation of the grants—the contract rights—which the plaintiffs claim they had when the ordinance was passed. No action other than the passing of the ordinance had been taken by the City when the bill for injunction was filed, in fact the ordinance did not become effective for thirty days after the bill was filed.

It has been decided by this court, within recent years, at least twice, that for a municipal corporation to thus

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assert by resolution or by ordinance that a claim of contract right against it is not valid and to direct its legal representative to test in the courts the right so asserted, neither impairs the obligation of the contract assailed nor deprives the persons claiming under it of their property without due process of law.

In *Des Moines v. Des Moines City Ry. Co.*, 214 U. S. 179, it was asserted as a ground of federal jurisdiction that a resolution of the Des Moines City Council was a law which impaired the obligation of the contract which the railway company claimed to have with the City, and that if given effect it would deprive the company of its property without due process of law. The Circuit Court overruled an objection to its jurisdiction and granted an injunction against the enforcement of the resolution. This resolution, in terms, ordered the railway companies to remove their tracks, poles and wires from the streets, and in case of failure to do so within a time stated, the City Solicitor was "instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the resolution." In a unanimous decision, this court reverses the lower court, saying:

"We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the City Solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the City Solicitor to take action to enforce the city's position. The only action to be expected from a City Solicitor is a suit in court. We cannot take it to have been within the meaning of the

direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right."

Since the court "lays on one side" the distinction between a resolution and an ordinance, this decision seems clearly to rule the case at bar.

Again, in *Defiance Water Co. v. Defiance*, 191 U. S. 184, a claim to federal jurisdiction was based on a resolution of an Ohio city council, which it was claimed impaired the obligation of a contract which the water company had with the City. But this court, while finding that the record disclosed the City as claiming that the water company did not have a valid contract with the City and that a suit to test its validity had been instituted in a state court by the City Solicitor, nevertheless held that the action so taken was not obnoxious to the prohibition of the Federal Constitution, and the case was dismissed for want of jurisdiction.

The ordinance involved in this case, like the one in the *Des Moines Case*, having regard to all of its provisions, even including its title, seems very clearly to be no more than an assertion on the part of the City Council of what it considers the rights of the City to be, with authority and direction to the City Solicitor to resort to the courts to test the validity of the claims made, if they are denied by the traction companies, and the cases cited are authority sufficient, if indeed authority be needed, to justify the conclusion that such an expression of purpose to resort to the courts of the country and to abide by their decision, is not a law impairing the obligation of a contract, within the meaning of the Constitution.

A careful reading of this ordinance, especially of §§ 3 and 5, makes it convincingly clear that the writer of it must have had in mind the decisions which we have cited,

and that he has attempted, successfully it seems to me, to keep clearly within the law established by them.

The allegation in paragraph 14 of the bill, that the City, and its agents and employees, threaten to interfere with and prevent the operation of the street railways, states no invasion of a federal right, unless such action is threatened under warrant of an invalid ordinance. If the ordinance is valid it can add nothing to the other allegations of the bill and if invalid it is futile.

It is impossible for me, also, to share in the interpretation given to § 4 of the ordinance which makes it the subject of special injunctive relief. The section provides that the continuing to operate cars on the streets in controversy "shall be deemed an acceptance of this ordinance and of all of the terms hereof." Considering the ordinance as a whole, and not as if it were a group of independent provisions, if this section has any meaning at all, it cannot be more than an assertion on the part of the City, that if the companies, without formal acceptance, but without protest, should continue to operate the lines of railway, such action would be taken as implying an acceptance of the burdens as well as of the benefits of the ordinance. But such an implication of acceptance certainly could not prevail in any court against an assertion to the contrary by the companies.

If the companies really have contract rights in the streets, as they claim that they have, such rights cannot be impaired by the exercise of them, and if they do not have such rights, this declaration of the section cannot harm them, and therefore it cannot properly serve as a basis, either for jurisdiction or for an injunction.

Thus considering the question of jurisdiction as depending wholly upon the form of the allegations of the bill, it seems very clear that the federal courts are without jurisdiction in the case.

If, now, we consider the answer in the case we shall

find the strongest possible confirmation of the conclusion just arrived at.

The first paragraph of the answer denies the jurisdiction of the court and asserts that it is apparent on the face of the bill that it seeks to prevent the City of Cincinnati from resorting to the state courts for a decision of the controversy, and the answer to paragraph 13 of the bill, quoted above, is a special denial. Then follows this paragraph of the answer:

"13. The defendant denies that under the authority of said Ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs, or either of them, of said electric street railway, or cause any damage or injury of any kind to the plaintiffs, or either of them, *and defendant avers that the enforcement of said Ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction first had and obtained, and after a hearing on due and reasonable notice to all interested parties.*"

It is difficult to imagine how a clearer statement than this could be framed on the part of the City, that the enforcement of the ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction.

When to all this we add that not one word of evidence was offered on the trial tending to sustain the allegations of paragraph 14 of the bill, that the defendant threatened and intended to interfere with and unless enjoined would prevent the operation of the street railways, it becomes very clear that we have before us an utterly unsubstantial and purely paper attempt to carry into the federal courts a case which, because of its "many difficult problems arising under local laws," is peculiarly one for first decision in the state courts, with the right of revision in this court as provided for by law.

It has been for many years the constant effort, repeatedly declared, of Congress and of this court, to prevent the evasion of the Constitution and laws of the United States, by bringing into the federal courts controversies between citizens of the same State, *Bernards Township v. Stebbins*, 109 U. S. 341, 350, and it is because of my conviction that the integrity of the jurisdiction of the federal courts can best be preserved by refusing to extend it to doubtful cases that this dissent is written thus at length. My conclusion is that the plea of the defendant to the jurisdiction of the District Court should have been sustained on the face of the bill, but that if doubt were entertained as to this, then when the plaintiffs rested without attempting to prove their allegations of intended interference by the City with the operation of the roads, it became the duty of the District Court to proceed no further, but to dismiss the case, for the reason that it did not really and substantially involve a controversy properly within the jurisdiction of the court. Judicial Code, § 37.

There remains to be added only this: That, even if agreement were possible with the conclusion that the court has jurisdiction in the case, nevertheless I could not agree with the judgment rendered, for the reason that it seems to me very clear that the principal grant on which the plaintiffs rely, that from the County Commissioners dated March 23, 1889, expired on March 23, 1914, before the ordinance complained of was passed. My reason for this conclusion is that the Supreme Court of Ohio in 1905 held the Ohio Act of 1883 (80 Ohio Laws, 173) invalid because in violation of § 26 of Article II of the state constitution. *Railway Co. v. Railway Co.*, 5 Ohio C. C. (N. S.) 583, affirmed 73 Ohio St. 364. This is conclusive on all federal courts. If unconstitutional in 1905, the act was unconstitutional in 1889, when the grant by the Commissioners was made, and therefore

§§ 3439 and 2502 of the Revised Statutes of Ohio of 1880 were then in force and imposed the limitation of twenty-five years on all grants by County Commissioners. The doctrine that rights acquired before cannot be impaired by a change of judicial decision, has no application to this case, for the reason that there was no settled principle of decision in Ohio in cases such as we have here, where counties were concerned, prior to 1889, or at any other time, but, as the decisions abundantly prove, each case as it arose was disposed of on its own peculiar facts, e. g., *State v. Powers*, 38 Ohio St. 54 (1882), overruled in *State ex rel. v. Shearer*, 46 Ohio St. 275 (1889).

For the reasons here given and upon the authorities cited, my conclusion is that the decree of the District Court should be reversed, and the case remanded with instructions to dismiss the bill for want of jurisdiction.

MR. JUSTICE BRANDEIS concurs in this dissent.